

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

502
BRIEF AND APPENDIX FOR APPELLANT.

IN THE
**United States Court of Appeals for the
District of Columbia**

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

No. 8039

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Joseph W. Steele

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JAMES G. STAHLMAN, APPELLANT,

v.

**FEDERAL COMMUNICATIONS COMMISSION,
APPELLEE.**

**APPEAL FROM A JUDGMENT OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF COLUMBIA.**

ELISHA HANSON,
Attorney for Appellant,
James G. Stahlman.

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Of Counsel.

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JAMES G. STAHLMAN, APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION,
APPELLEE.

BRIEF FOR APPELLANT, JAMES G. STAHLMAN.

Jurisdictional Statement.

This is an appeal from a final judgment, designated an order, of the District Court of the United States for the District of Columbia, entered August 15, 1941, in a proceeding instituted by the Federal Communications Commission to require appellant to appear before the Commission and to give testimony concerning matters being investigated under Commission Order No. 79 (Appellant's App. 40).

The opinion of the court below was rendered on August 14, 1941, and is not yet reported (Appellant's App. 37).

The jurisdiction of the court below was invoked under Section 409 (d) of the Communications Act of 1934 (48 Stat. 1096; 47 U. S. C., Sec. 409 (d)) in an application filed by the Commission, praying that appellant be directed to show cause why an order should not issue requiring him to appear before said Commission, or an officer properly designated by it, to testify concerning matters being investigated under Commission Orders No. 79 and 79-A and further, that upon the return of the order to show cause, appellant be directed to appear before said Commission, or an officer properly designated by it, to testify concerning said matters (Appellant's App. 1).

The jurisdiction of this Court to review the final judgment aforesaid is invoked under Section 128 of the Judicial Code, as amended (43 Stat. 813, 28 U. S. C., Sec. 225 (a)).

Statement of the Case.

On March 20, 1941, the Federal Communications Commission issued its Order No. 79 which directed that it

“undertake an immediate investigation to determine what statement of policy or rules, if any, should be issued concerning applications for high frequency broadcast stations (FM) with which are associated persons also associated with the publication of one or more newspapers and that public hearings with respect thereto be held at such times and such places as the Commission may direct, and that such investigation and public hearings shall also include consideration of statements of policy or rules, if any, which should be issued concerning future acquisition of standard broadcast stations by newspapers.” (Appellant's App. 6.)

The Commission's Order was not issued as the result of any complaint or cause or pursuant to a specific application or any conflicting applications for station licenses, or for the renewal, modification or transfer of station licenses. It named no party or parties respondent.

Prior to any hearings, on June 28, 1941, the Commission forwarded to broadcast station licensees a questionnaire which stated that its purpose was to elicit information concerning the present relations between standard broadcast station licensees and newspapers in their respective communities or service areas (Appellant's App. 21). This was followed on July 1, 1941, by the issuance of Commission's Order No. 79-A which set forth ten subjects with reference to which testimony and other evidence was to be taken pursuant to its Order No. 79 (Appellant's App. 7).

Appellant is the publisher of the *Nashville Banner*, a daily newspaper published in Nashville, Tennessee. In times past he served as president of the American Newspaper Publishers Association, president of the Southern Newspaper Publishers Association, vice-chairman of the Publishers National Radio Committee and as a member of the Radio Committee of the American Newspaper Publishers Association.

On July 10, 1941, the Commission addressed a letter to appellant as follows:

"At hearings before the Commission beginning July 23, 1941, in connection with the investigation authorized under Order No. 79 with respect to the joint association of newspapers and radio stations, the Commission is planning to receive testimony concerning the past and present relations between the radio industry and the radio networks on the one hand, and the newspaper industry and the press services on the other with respect thereto. The Commission will inquire into the arrangements made in the past for the broadcasting of news, the part played by radio stations associated with newspapers in the broadcasting of news, the availability of newspaper reports to broadcasters, the collection of news for radiobroadcasting, and other related matters coming within the scope of the topics set forth in Order No. 79-A, a copy of which is enclosed for your information. Your personal knowledge and ex-

perience with respect to these matters will materially assist the Commission in obtaining information with reference to the matters set forth in Order No. 79.

"You are, accordingly, notified hereby that the Commission desires your testimony with respect to these matters in so far as they come within your personal knowledge and experience, and you are requested to appear before the Commission on Thursday, July 24, for the purpose of giving such testimony unless you are hereafter notified to the contrary. Within a few days a subpoena calling for your appearance will be served upon you. You will, of course, be entitled to receive all allowable witness fees and travel expenses." (Appellant's App. 16-17.)

On July 19, 1941, an agent of the Commission handed appellant a paper purporting to be a subpoena of the Commission commanding appellant to appear before the Federal Communications Commission on July 25, 1941, to testify "in the Matter of Order No. 79" (Appellant's App. 17). No hearing was held at the place and time designated in the aforesaid subpoena.

On July 28, 1941, another paper purporting to be a subpoena of the Commission commanding appellant to appear before the Commission on August 1, 1941 was left in appellant's office at the United States Navy Department, Washington, D. C., where appellant, an officer in the United States Naval Reserve, is now on active duty (Appellant's App. 17).

On July 29, 1941, the purported subpoena involved in this proceeding was handed to appellant requiring him to appear before the Commission on August 1, 1941 (Appellant's App. 2, 16). On the same day the Commission cancelled the purported subpoenas of July 19, 1941, and July 28, 1941 (Appellant's App. 17).

Appellant referred each and every one of the three papers hereinabove described to Elisha Hanson, his attor-

ney, who advised him that each showed on its face that it was a nullity inasmuch as it purported to command him to appear and testify in a proceeding not authorized by the Act and in respect of matters concerning which the Commission is without power or authority to issue any statement of policy or rules.

After the announcement by the Commission of the opening date of the hearing, namely, July 23, 1941, the American Newspaper Publishers Association, by its attorney, in accordance with the rules and regulations for procedure issued by the Commission, entered its appearance specially in the matter of the investigation directed by Order No. 79 and moved to vacate both Order No. 79 and supplemental Order No. 79-A and to terminate the proceeding. The Association's counsel further moved for oral argument on the said motion and still further for a stay in the proceedings until after argument and decision on the motion (Appellant's App. 29, 31).

The Commission, without affording counsel an opportunity to be heard, in secret session held immediately before the opening of its hearing on July 23, 1941, denied the Association's motion and when counsel for the Association asked the Commission for an opportunity to discuss his motion he was refused that opportunity by the Commission at the hearing (Appellant's App. 20).

Appellant was vitally interested as a member of the American Newspaper Publishers Association in the denial by that Association of the Commission's power to conduct the inquiry.

Pursuant to advice of counsel and in reliance upon the soundness of this advice as demonstrated by the position taken by the American Newspaper Publishers Association in its special appearance and motion before the Commission, appellant did not appear on August 1, 1941, as commanded in the purported subpoena. On that day when

appellant's name was called at the hearing, counsel to whom he had referred the purported subpoena informed the Commission that appellant did not appear on the advice of counsel to the effect that the inquiry was unlawful since it was being made pursuant to an order of the Commission which was without warrant under the Act (Appellant's App. 19).

On August 2, 1941, the Commission filed in the court below an application for an order requiring the appearance of appellant pursuant to the purported subpoena of July 29, 1941 (Appellant's App. 1).

On the same day the court below ordered appellant to show cause why an order should not issue requiring him to appear before the Commission to testify concerning the matters being investigated under Commission Orders No. 79 and 79-A (Appellant's App. 12).

On August 11, 1941, appellant filed his return to the order to show cause and his answer to the Commission's application (Appellant's App. 12).

The court below rendered its opinion on August 14, 1941, and on the following day ordered appellant to appear before the Commission to testify concerning the matters being investigated under Commission Order No. 79 (Appellant's App. 37, 40).

Statement of Points.

A complete statement of points relied upon in this appeal is set forth at pages 41-49 of Appellant's Appendix. It is respectfully requested that these points be read as a part of this brief.

Summary of Argument.

The Commission has no power to consider or to adopt a policy or rules by which persons engaged in the newspaper publishing business may by reason of that fact alone be

differentiated as a class for the purpose either of preference in the assignment of radio facilities or of disqualification from engaging in the radio broadcasting business.

Therefore, it has no power to initiate an investigation to consider the adoption of such a policy.

Order No. 79 asserts such power. Its validity must be determined solely by its terms and the Order shows on its face that it exceeds the express or implied powers conferred upon the Commission by Congress under the Act.

The discretion of the Commission is limited. In each case it is under a duty to pass upon a particular application or conflicting applications for the same facilities as measured by the statutory standard of "public interest, convenience, or necessity". *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 145 (1940).

The Commission cannot add standards at variance with that standard nor can it increase the limitations upon the holding and transfer of licenses as they are set forth in Sections 310 and 311 of the Act.

The broadcasting field is open to everyone, provided there be an available frequency without interference to others and the applicant can show competency, adequacy of equipment and financial ability. *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U. S. 470 (1940).

Order No. 79 oversteps these limits. It singles out as a special class for discriminatory treatment the applications of persons associated with newspapers.

This would constitute an injurious discrimination in violation of the Fifth Amendment to the Constitution of the United States. Such a discriminatory policy would also be in conflict with the nondiscriminatory policy written by Congress into the Act.

Under the *Sanders* decision affiliation with a newspaper cannot be made a separate and independent element—an operative fact—in passing upon applications. The test is not the mere fact of joint control of newspapers and radio stations, or whether there is competition or monopoly, but what will best serve the interest of the public. *Yankee Network v. Federal Communications Commission*, 71 App. D. C. 11, 22, 107 F. (2d) 212, 223 (1939). No provision of the Act or rule of law prohibits broadcasting by the owner of a newspaper. *Tri-State Broadcasting Corp. v. Federal Communications Commission*, 68 App. D. C. 292, 294, 96 F. (2d) 564, 566 (1938).

Order No. 79 is not an assertion of authority to weigh joint control of a newspaper and radio station *merely as one circumstance* governing particular applications in relation to the considerations enumerated by the Supreme Court. On the contrary the said Order places applicants in the newspaper field in a separate category for preference or incapacitation. This is in substitution rather than in fulfillment of the policy clearly expressed by Congress.

How far Congress could legislate on the matters hereinabove mentioned is not before this Court in this proceeding grounded on Order No. 79. The Commission cannot usurp the legislative function of making a choice between a policy of favoring integration of newspapers and radio stations and a policy of compelling divorcement of the two forms of enterprise.

Since Order No. 79 exceeds the Commission's powers it is without warrant of law and the subpoena issued and served upon appellant pursuant thereto is a nullity.

The Commission can derive no aid from the broad terms of Section 403 because Order No. 79 goes beyond the Act itself. The *Sanders* and *Tri-State Broadcasting Corporation* cases remove Order No. 79 from the bounds of any matter within the authority of the Commission or any ques-

tion which may arise under the Act and in relation to its enforcement.

The investigation was not ordered by the Commission for the purpose of making recommendations to Congress for additional legislation as provided in Section 4 (k) of the Act. The face of the Order shows that its sole purpose is to conduct an inquiry to lay the basis for the adoption of a policy *to be issued by and to be applied by the Commission for its own guidance.*

Even if Section 4 (k) is deemed to be involved herein the Commission can only demand information relevant to a power conferred upon it by Congress. The Commission's powers of investigation by testimonial compulsion are not as broad as the regulatory powers of Congress itself in the field of communications. By falling outside the Act Order No. 79 necessarily falls outside Section 4 (k).

In any event the investigation initiated by Order No. 79 is a general fact-finding inquiry which exceeds the powers of the Commission.

Harriman v. Interstate Commerce Commission, 211 U. S. 407 (1908) and *Federal Trade Commission v. American Tobacco Company*, 264 U. S. 298 (1924) support the conclusion that no matter how broad the terms of the investigatory provisions of the statute may be, an investigation by an administrative agency either on its own motion or pursuant to Congressional resolution must be ancillary to a lawful purpose embraced by the powers granted in the statute.

Smith v. Interstate Commerce Commission, 245 U. S. 33 (1917) decided nothing to the contrary. In that case the power asserted was a narrow one and clearly fell within the express power specifically conferred upon the Commission under Section 20 of the Interstate Commerce Act.

In reaching for the power claimed by Order No. 79 the Commission, the creature of Congress, seeks to become greater than its creator contemplated.

ARGUMENT.**POINT I.**

The Act confers no power upon the Commission to conduct the investigation directed by its Order No. 79.

The sole question in this appeal is whether the Commission has the power to consider or to adopt and apply a general policy or rules by which persons engaged in the newspaper publishing business or associated therewith may *by reason of that fact alone* be differentiated as a class apart from all other persons for the purpose either of preference in the assignment of radio facilities or of disqualification from engaging in the radio broadcasting business.

The Commission has no such power either by express grant of authority conferred upon it by Congress under the Act or by implication from those powers which are expressly enumerated in the Act. In fact, the precise terms of the Act negative the delegation by Congress of any power to conduct the inquiry in controversy.

If the Commission has no power to adopt a policy by which newspaper ownership or association is made *per se* a basis of preference or of disqualification then it has no power to initiate an investigation to consider the adoption of such a policy.

If Order No. 79 is beyond the orbit of the express or implied powers conferred by Congress upon the Commission under the Act, then this appeal presents a question for judicial decision.¹ That question must be adjudged solely

¹ "Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision". *Federal Radio Commission v. Nelson Bros. Co.*, 289 U. S. 266, 276 (1933).

by the terms of the Order pursuant to which the subpoena herein was issued and served upon appellant.

Recognition of the need of flexibility in the administrative process cannot be pushed so far as to disregard the rudimentary principle of fair play that appellant must be afforded notice and an opportunity to test his rights within the terms of the order actually issued.²

On its face Order No. 79 proclaims as its sole purpose the undertaking of an investigation "to determine what statement of policy or rules, if any, should be issued concerning applications for high frequency broadcast stations (FM) with which are associated persons also associated with the publication of one or more newspapers" and "concerning future acquisition of standard broadcast stations by newspapers" (Appellant's App. 6).

Paragraph 4 of the Order states that the information sought is *for the guidance of the Commission* in passing upon applications of persons associated with newspapers. Paragraphs 5 and 6 of the Order aver that the Commission will consider the adoption of a policy with respect to joint control of radio stations and newspapers, *such policy to be applied by the Commission* in passing upon high frequency broadcast applications and applications for the future acquisition of standard broadcast stations by newspapers. (Emphasis supplied.) (Appellant's App. 5-6.)

Order No. 79-A reaffirms the above mentioned purposes and the same purposes are declared in a questionnaire distributed by the Commission among its station licensees on June 28, 1941 (Appellant's App. 7, 21). To say that until the Commission actually adopts a discriminatory policy the appellant is not injured or that the constitutionality of the order cannot be judged is to lose sight of the question of

² Cf. *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 143 (1940).

existence of power as distinguished from the question of wrongful exercise of power.

In this respect the court below erred when it said that before action by the Commission is taken "its constitutionality cannot be weighed and determined by a court, and, indeed no presumption is to be indulged in that any action will be taken that is unconstitutional; nor is it to be presumed that the respondent will be required to give testimony of an irrelevant or privileged nature. The inquiry should be conducted fairly and reasonably, and it must be presumed that it will be". (Appellant's App. 39-40.) This reasoning begs the very question at issue. If the investigation is beyond the statutory powers of the Commission, the manner of conducting it or its final outcome are immaterial.

The issue in this proceeding should not be confused with the questions concerning the appealability of orders by a person aggrieved or whose interests are adversely affected under the procedural provisions of Section 402 (b) of the Act. In such situations the long settled judicial rule that prescribed administrative remedies must be exhausted prior to resort to the courts is applicable.³

The question here is entirely different. This proceeding originated in an application to the court below by the Commission under Sec. 409 (d) of the Act for an order requiring the appearance of appellant before the said Com-

³ It would be presumptuous to expand before this Court upon the doctrine of prior exhaustion of administrative remedies as a prerequisite to judicial review under the Communications Act. The doctrine has been fully considered and frequently applied by this Court in cases clearly distinguishable from the instant one. *Black River Valley Broadcasts v. McNinch*, 69 App. D. C. 311, 101 F. (2d) 235 (1938); *Southland Industries v. Federal Communications Commission*, 69 App. D. C. 82, 99 F. (2d) 117 (1938); *Red River Broadcasting Co. v. Federal Communications Commission*, 69 App. D. C. 1, 98 F. (2d) 282 (1938).

The Supreme Court has recently applied the doctrine in relation to the National Labor Relations Act. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50 (1938).

mission to testify concerning matters being investigated under Orders No. 79 and 79-A. This provision clearly contemplates a judicial determination *in limine* on the question of law as to whether the Commission's order is within the powers conferred upon it under the Act. This is purely a question of statutory construction and constitutional right.⁴ There is ample precedent to distinguish such a proceeding from one in which a party prematurely resorts to the courts before exhausting the procedure and administrative remedies before the Commission.⁵

When a subpoena is issued by an administrative agency which is not in aid of a lawful power of that agency the person commanded to appear is entitled to test the validity of the subpoena at the outset. He is not required to wait until he has been actually injured or adversely affected. In such instances the time to bar a trespass upon one's personal or property rights is at the threshold of the attempted invasion.

If this were not so it might as well be argued that if the Commission issues an order of investigation to determine what policy, if any, should be adopted for taxing licensees of radio stations on the amount of their invested capital therein—a power plainly beyond the Act—the validity of such an order cannot be determined until the Commission decides to adopt such a policy to the injury of certain per-

⁴ The validity of subpoenas issued by administrative agencies was tested in this manner in cases involving the scope of the investigatory powers of the following: the Federal Trade Commission in *Federal Trade Commission v. American Tobacco Company*, 264 U. S. 298 (1924), *Federal Trade Commission v. Smith*, 34 F. (2d) 323 (S. D. N. Y. 1929), *Federal Trade Commission v. Smith*, 1 F. Supp. 247 (S. D. N. Y. 1932), *United States v. Basic Products Co.*, 260 Fed. 472 (W. D. Pa. 1919); the Interstate Commerce Commission in *Interstate Commerce Commission v. Brimson*, 154 U. S. 447 (1894), *Harriman v. Interstate Commerce Commission*, 211 U. S. 407 (1908); the Secretary of Agriculture under the Packers and Stockyards Act in *Cudahy Packing Co. v. United States*, 15 F. (2d) 133 (C. C. A. 7th, 1926).

⁵ See cases cited under note 4, *supra*.

existence of power as distinguished from the question of *wrongful exercise of power*.

In this respect the court below erred when it said that before action by the Commission is taken "its constitutionality cannot be weighed and determined by a court, and, indeed no presumption is to be indulged in that any action will be taken that is unconstitutional; nor is it to be presumed that the respondent will be required to give testimony of an irrelevant or privileged nature. The inquiry should be conducted fairly and reasonably, and it must be presumed that it will be". (Appellant's App. 39-40.) This reasoning begs the very question at issue. If the investigation is beyond the statutory powers of the Commission, the manner of conducting it or its final outcome are immaterial.

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mission to testify concerning matters being investigated under Orders No. 79 and 79-A. This provision clearly contemplates a judicial determination *in limine* on the question of law as to whether the Commission's order is within the powers conferred upon it under the Act. This is purely a question of statutory construction and constitutional right.⁴ There is ample precedent to distinguish such a proceeding from one in which a party prematurely resorts to the courts before exhausting the procedure and administrative remedies before the Commission.⁵

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⁵ See cases cited under note 4, *supra*.

sons. Where there is no power to act at all the fact that inaction is one of the possible alternatives to be weighed cannot make lawful the consideration of that which is itself beyond the pale of the Act. In such cases it is immaterial that the Commission might finally take action favorable to certain persons or adverse to the interests of such persons.

The Supreme Court of the United States and this Court have warned that Congress has specifically limited the discretion of the Commission.⁶

It has been judicially determined that

“The Commission’s responsibility at all times is to measure applications by the standard of ‘public convenience, interest, or necessity’.”⁷

This is “the touchstone for the exercise of the Commission’s authority” in passing upon applications for the granting or for renewal or for modification of station licenses and for construction permits. Sections 307 (a), (b), (d), 309 (a), 312 (b), 319 (a).⁸ In each case the question is one of public interest, the securing and protecting of which is the underlying policy of the Act.⁹

In Sections 310 and 311 of the Act Congress has also specifically confined the Commission’s discretion in respect

⁶ *Federal Radio Commission v. Nelson Bros. Co.*, 289 U. S. 266, 285 (1933); *Yankee Network v. Federal Communications Commission*, 71 App. D. C. 11, 18, 107 F. (2d) 212, 219 (1939); *Heitmeyer v. Federal Communications Commission*, 68 App. D. C. 180, 189, 95 F. (2d) 91, 100 (1937).

⁷ *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 145 (1940).

⁸ The text of these sections is set forth in Appellant’s App. at pages 52, 53 and 55.

⁹ *WOKO v. Federal Communications Commission*, 71 App. D. C. 228, 230, 109 F. (2d) 665, 667 (1939).

of the limitations upon the holding and transfer of licenses.¹⁰

The Commission has no power to declare or apply a public policy not in conformity with the sole standard of "public convenience, interest, or necessity" set forth in Sections 307 and 309 of the Act nor has it the power to increase the limitations of Sections 310 and 311 of the Act.

Yet this is precisely the purpose and effect of the assertion of power in Order No. 79, supplemented by Order No. 79-A, as shown on the face of both Orders.

Whatever doubts may have existed on the extent of the Commission's powers over licensing have been resolved by the decision of the Supreme Court of the United States in *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U. S. 470 (1940), which gives meaning and contour to the standard of "public convenience, interest, or necessity".

In that case a licensee of a radio station appealed from an order of the Commission granting approval of the application of a newspaper for the construction of another station in the area that the first station served and in the same city where the newspaper was published. A unanimous Court announced the following interpretations of the Act which are controlling in the controversy herein:

1. The Act recognizes that broadcasters are not common carriers and are not to be dealt with as such.

2. The field of broadcasting is one of free competition and the regulatory sections of the Act dealing with broadcasting demonstrate that Congress has not abandoned the principle of free competition therein as it has done in the case of railroads.

3. " * * * the Act does not essay to regulate the business of the licensee. The Commission is given no

¹⁰ For text of these sections see Appellant's App. at pages 53 and 54.

supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to everyone, provided there be an available frequency over which he can broadcast without interference to others if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel." (309 U. S., at page 475.)

4. "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." (309 U. S., at page 475.)

The foregoing judicial interpretations can only mean that the Commission is under a mandate to approve an application for a station license or for the renewal or modification thereof if "public interest, convenience, or necessity" would be served thereby. Otherwise it must be denied. By the *Sanders* decision the discretion of the Commission is limited by the considerations enumerated by the Supreme Court as the *exclusive* considerations to be weighed by the Commission in applying the standard of public interest.

Prior to the *Sanders* case this Court properly held that no provision of the Act or rule of law prohibited broadcasting by the owner of a newspaper.¹¹ Subsequent to the *Sanders* case Judge Edgerton of this Court in a concurring opinion in *Colorado Radio Corporation v. Federal Communications Commission*, — App. D. C. —, 118 F. (2d) 24, 28 (1941), unequivocally stated that the language of the *Sanders* opinion was

"as much as to say that licenses should be denied *only because of* interference, incompetence, inadequate equipment or financial inability". (Emphasis supplied.)

¹¹ *Tri-State Broadcasting Corp. v. Federal Communications Commission*, 68 App. D. C. 292, 294, 96 F. (2d) 564, 566 (1938).

Order No. 79 oversteps the aforementioned limits imposed by the courts for the governance of the Commission's discretion. Ownership of or association with a newspaper cannot be made a separate and independent element—an operative fact—in passing upon applications. The Commission's discretion is not unfettered. It must operate within statutory limits. The Supreme Court has canalized the Commission's discretion by considerations which exclude ownership of or association with a newspaper as *in and of itself* a factor by which a preference may be granted or a disqualification may be imposed in acting upon applications.

No question is here presented as to the authority of the Commission to weigh particular applications for joint control of a newspaper and radio station *as merely one circumstance* in its bearing upon the considerations enumerated in the *Sanders* decision. Order No. 79 did not launch an inquiry as a prelude to the exercise of the Commission's discretion with reference to the effect on competency, adequacy of equipment, financial ability or ability to render the best practicable service to the community of the circumstance that a particular applicant is a newspaper owner or associated with a newspaper. The court below mistakenly thought that this question was the one before it (Appellant's App. 39).

On the contrary, Order No. 79 frankly announces the purpose of considering the adoption of a general policy of discriminatory administration of the Act by singling out persons associated with newspapers as a special class of applicants. Such applicants might be favored in the assignment of radio facilities or they might be disqualified to receive approval of their applications, solely by reason of belonging to the particular class.

No such discriminatory policy is written into the Act. Nor did Congress intend to endow the Commission with

discretionary authority to erect such a policy by earmarking for special treatment a class of applications solely by reason of the common fact that the applicants are persons in the newspaper field.

A mere incantation in Order No. 79 of the function of considering "public interest, convenience, or necessity" cannot mask the true substance of the Order as an attempt to consider a policy *in substitution of* rather than *in aid of* the public policy clearly expressed by Congress.

In short, the Commission, the creature of Congress, seeks to become greater than its creator contemplated.

Can it be said that the broadcasting field is open to everyone on equal terms within the holding in the *Sanders* case if the Commission can make a general classification of persons who own newspapers as a basis of declaring in a policy or rules that such persons are favored applicants even though they do not meet the tests of public interest announced by the Supreme Court? Or that such persons are disqualified from holding licenses even though they do meet the tests of public interest set forth in the *Sanders* decision?

The answer is self-evident. The Commission cannot add to the standard of "public interest, convenience, or necessity" as articulated in the *Sanders* opinion. The Commission cannot add to the specific disqualifications enumerated in Sections 310 and 311 of the Act.

Solely by reason of being engaged in the newspaper publishing business an applicant does not gain a preferred status in the approval of licenses. For the same reason he does not *ipso facto* descend to an inferior status or fall within the specific bans of Sections 310 and 311. Nothing in the Act or in judicial decision lends the faintest support to the claim that the Commission is vested with power to place applicants in the newspaper business in a separate category for preference or incapacitation.

For the reasons just mentioned nothing is gained by listing in Order No. 79-A certain matters which purport to infuse into Order No. 79 the guise of an inquiry into the effect of joint association of newspapers and radio stations upon competition among broadcast stations, or monopolization of broadcast facilities.

This is unavailing. Recently this Court took pains to point out that while it was the intention of Congress to preserve competition in broadcasting "it certainly does not follow therefrom that Congress intended the Commission to grant or deny an application in any case, other than in the interest of the public". *Yankee Network v. Federal Communications Commission*, 71 App. D. C. 11, 22, 107 F. (2d) 212, 223 (1939). In rendering his opinion Judge Miller said:

"The test is not whether there is a monopoly, on the one hand, or an overabundance of competition, on the other, but whether the granting or denying of the application will best serve the interest of the public."

The Commission cannot lawfully adopt any other test than the one stated by this Court. Neither competition nor monopoly can be employed as absolute economic or legal concepts to enlarge the jurisdiction of the Commission beyond the test of public interest.

It is especially significant that it was in the *Sanders* case that the Supreme Court first decided that "resulting economic injury to a rival station is not *in and of itself, and apart from considerations of public convenience, interest, or necessity, an element*" which the Commission must weigh on an application for a license.¹² This alone refutes the theory that the effect of competition on existing or future stations can be considered apart from the facts of particu-

¹² *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U. S. 470, 473 (1940) (Emphasis supplied). See also *Tri-State Broadcasting Co. v. Federal Communications Commission*, 71 App. D. C. 157, 158-159, 107 F. (2d) 956, 957 (1939).

lar cases or as tested by private interests. The Supreme Court has served notice that the only considerations that bear upon the qualifications of particular applicants in the granting or denying of licenses are those expressly sanctioned by it in the *Sanders* case in accordance with Congressional intention.

The Commission therefore has no power to blanket applications of persons associated with newspapers for the avowed object of considering the adoption of a policy which may either encourage affiliation of newspapers and radio stations as tending toward a healthy state of competition or which may discourage such affiliation as tending toward the suppression of competition.¹³

¹³ In its brief in the court below the Commission pointed out that the question of common ownership of newspapers and radio stations has been discussed and debated in Congress. It cited numerous references to the Congressional Record and congressional hearings on this question and referred to a bill introduced in the House of Representatives providing for divorcement of ownership or control of newspapers and radio stations in the same area or zone.

All of these matters to which references were made antedate the *Sanders* decision which precludes the setting up of joint ownership of newspaper and radio station as a separate and independent element in passing upon applications for licenses. All but one of the matters antedate the *Tri-State Broadcasting Company* case in which this Court said that it knew of no provision of law which forbade broadcasting by the owner of a newspaper.

The Commission quoted at great length in its brief in the court below from a statement made by Senator Wallace H. White of Maine on March 17, 1937, in which he analyzed the problems incident to joint control of radio and newspapers. But the Commission failed to observe that the same Senator, on July 31, 1941, introduced S. 1806 (77th Cong., 1st Sess.) to amend the Communications Act of 1934 so as to codify the interpretation of the *Sanders* decision and to curb discriminatory action by the Commission.

In introducing his bill, Senator White said:

"Section 11 of the bill proposes a new sentence as an amendment to section 326 of the present act which codifies an interpretation placed upon the act by the Supreme Court of the United States in the case of the *Federal Communications Commission v. Sanders Brothers Radio Station* * * *.

"Notwithstanding this pronouncement of the Supreme Court, notwithstanding the fact that no language can be found in the act which

In passing upon applications for the same facilities the Commission may consider the effect of the competitive situation only in relation to the qualifications of the applicants as they bear upon the public interest defined in the *Sanders* decision. Competition or monopoly may mean different things in different situations. Neither can be made a separate and independent element. Only the circumstances of the particular case can determine the bearing of competitive rivalry upon the ability of the applicant adequately to serve his public.

If further evidence of the Commission's assertion of extra-statutory power be needed, it is amply adduced in the Commission's supplemental Order No. 79-A issued on July 1, 1941 and in a questionnaire of June 28, 1941, forwarded by the Commission to station licensees (Appellant's App. 7, 21).

confers any right upon the Commission to concern itself with the business phases of the operation of radio broadcast stations and notwithstanding the further fact that section 3 (h) of the act provides that a person engaged in radio broadcasting should not be regarded as a common carrier, the Commission has nevertheless concerned itself more and more with such matters. The charge is made that the Commission is attempting to control both the character and source of program material and the contractual or other arrangements made by the licensee for the acquisition of such material.

"The amendment proposed spells out in black and white what it is believed was not only the original intention of Congress but is its present intention, with respect to this subject, in the hope that confusion and controversy can be eliminated.

* * *

"Section 15 of the bill proposes the addition of an entirely new section. This section is designed to curb an alleged tendency upon the part of the Commission to discriminate in a manner not authorized by the statute between applicants for broadcast and other radio facilities and to require as a condition to grants made the doing of certain acts which the Commission has no authority under the statute to require.

"When the Congress enacts a law creating an administrative tribunal and defines its powers, duties, and functions, we consider it as fundamental that the delegation of authority thus made must be limited by the enabling act. Such a tribunal has and must exercise those powers which are specifically enumerated. In addition, it must

Order No. 79-A sets forth ten specific subjects concerning which the Commission proposed to take testimony and other evidence pursuant to Order No. 79.¹⁴ Over none of these matters does the Commission have any authority since information on all of the subjects listed is beyond the domain of its statutory powers and in aid of Order No. 79 which is itself invalid.

The questionnaire of June 28, 1941,¹⁵ shows on its face that it is nothing more or less than a command from the Commission to its licensees to furnish the Commission with a bill of particulars in respect of the newspaper publishing

exercise those powers which are necessarily incident to the exercise by it of those powers expressly enumerated. It is not, however, authorized or permitted to set itself up as a general legislative body making its own rules of conduct and decision wholly apart from and beyond the language of the statute. The tendency to do this, prevalent among virtually all administrative tribunals, has recently become very aggravated at the Commission. This, in my opinion, must be arrested by the enactment of specific legislation along the lines here suggested." (87 Congressional Record, No. 140, July 31, 1941, pages 6642, 6643.)

The pertinent portion of the proposed Section 11 reads:

"Nothing in this Act shall be understood or construed to give the Commission the power to regulate the business of the licensee of any radio-broadcast station and no regulation, condition, or requirement shall be promulgated, fixed, or imposed by the Commission, the effect or result of which shall be to confer upon the Commission supervisory control of station programs or program material, control of the business management of the station or control of the policies of the station or of the station licensee."

Proposed Section 15 reads as follows:

"Penalties, denials, prohibitions, and conditions other than those expressly authorized by statute shall not be exacted, enforced, or demanded by the Commission in the exercise of its licensing function or otherwise and no sanctions not authorized by statute shall be imposed by the Commission upon any person. Rights, privileges, benefits, or licenses authorized by law shall not be denied or withheld in whole or in part where adequate right or entitlement thereto is shown.

¹⁴ For text of Order No. 79-A see Appellant's App. at pages 7-8.

¹⁵ The questionnaire is set forth in Appellant's App. at pages 21-29.

business. It is an effort, *inter alia*, on the part of the Commission to inquire into the following phases of the newspaper publishing business: business policies; editorial policies; advertising practices; promotional activities; news policies; the nature of the work performed by newspaper employees; and the business connections of newspapers.

Each of these matters is outside the sphere of the Commission's authority. The Act does not grant the Commission power to conduct a general inquiry into the newspaper publishing business.¹⁶ But if it be argued that the ques-

The effective date of the imposition of sanctions or withdrawal of benefits or licenses shall, so far as deemed practicable, be deferred for such reasonable time as will permit the persons affected to adjust their affairs to accord with such action or to seek administrative reconsideration or judicial review."

It should also be observed that the Act does not vest in the Commission broad authority to regulate unfair methods of competition or to deal with restraints of trade in the field of communications. In fact such regulatory powers are vested in agencies such as the Federal Trade Commission (38 Stat. 717; 15 U. S. C. Sec. 41 *et seq.*) and the Anti-Trust Division of the Department of Justice pursuant to the Sherman Anti-Trust Act (50 Stat. 693; 15 U. S. C., Sec. 1 *et seq.*). No such power can be derived from Section 314 of the Act, as hereinabove shown. It is also significant that Congress specifically limited the Commission's regulatory powers in respect of particular practices or matters in Sections 315, 316, 317, 325 and 326 of the Act.

Apart from these considerations, the Commission's stress in its brief in the court below upon the controversial character of the problems of joint ownership of radio and newspapers in itself refutes its claim of authority to consider, adopt or apply a policy favoring either integration or divorcement of such enterprises. Reference to congressional debates and hearings on the pros and cons of this question, some of the discussions antedating the present Act, can only serve to show that Congress had no intention of vesting in the Commission the power to administer a policy in that regard. These discussions simply prove that Congress has not yet addressed itself to the problem. How far Congress could legislate on the subject is not before this Court in this proceeding grounded on Order No. 79. The Commission's views on the subject are not in issue herein. The question is one for Congress to decide and the Commission cannot usurp the legislative function.

¹⁶ Whether in view of the First Amendment to the Constitution of the United States Congress has such power is not in issue in this proceeding.

tionnaire is designed to obtain information in connection with the administration of the broadcasting provision of the Act, then the questionnaire shows on its face that it is an effort to inquire into matters which are foreclosed by the *Sanders* decision. The Commission has no supervisory control over the programs, the business management or the policies of radio stations. An inquiry into such matters is therefore not ancillary to any lawful authority of the Commission.

Order No. 79 recites that there is pending before the Commission a large number of applications for high frequency broadcast stations with which are associated persons also associated with one or more newspapers (Appellant's App. 5).¹⁷ But the said Order did not initiate an investigation to provide a basis for a comparative appraisal by the Commission of conflicting applications within the framework of the Commission's discretion to be applied in the light of the tests of public interest laid down by the Supreme Court.¹⁸

¹⁷ In its brief in the court below the Commission stated that on the day the investigation in controversy began 45 applications out of a total of 116 applications were of this nature.

¹⁸ Appellant is not unmindful of the rule of the Commission for consolidation of applications for hearing in cases which involve the same applicant or which arise from the same complaint or cause and applications which by reason of the privileges, terms or conditions requested present conflicting claims of the same nature. Rules of Practice and Procedure, Sec. 1.194, effective August 1, 1939. But this rule is inapplicable to the instant case. Order No. 79 does not purport to consolidate applications for hearing. It was not issued pursuant to a complaint or cause. Nothing in the Order indicates that the applications request privileges, terms or conditions that present conflicting claims of the same nature.

Judicial interpretation of an earlier rule which in part contained language similar to that given above confirms that the rule contemplates rival applications for the same facilities, that is, mutually exclusive applications. See *Federal Communications Commission v. Pottsville Broadcasting Company*, 309 U. S. 134 (1940); *Colonial Broadcasters, Inc. v. Federal Communications Commission*, 70 App. D. C. 258, 260, 105 F. (2d) 781, 783 (1939). Order No. 79 is not addressed to such a situation.

What the Commission is asserting is power to group together applications for licenses of persons associated with newspapers in order to determine a policy relating to affiliation of newspapers and radio stations irrespective of whether the applications are mutually exclusive or conflicting. Even if it were assumed that the applications pending before the Commission presented conflicting claims of the same nature, this would not efface the claim of power to consider the adoption of a general policy applicable to a pending or future group of applications solely by reason of the fact that the applicants are engaged in the newspaper publishing business.

That is the heart of the Order; and it lays bare the inescapable fact that the Commission has arrogated to itself the legislative function of making a choice between a policy by which integration of newspapers and radio stations may be fostered and a policy by which divorcement of newspapers and radio stations may be compelled.

This reaches for power which transcends the Act because it overflows the banks of discretion erected by the Supreme Court's interpretation in the *Sanders* decision. The Congress wrote into the Act a nondiscriminatory policy. The Commission has no power to substitute a policy of discrimination.

POINT II.

Order No. 79 and the subpoena issued and served upon appellant pursuant thereto violate appellant's rights as guaranteed by the Fifth Amendment to the Constitution of the United States.

Since the Act confers no power upon the Commission to conduct the inquiry which it has undertaken it follows that Order No. 79 is without warrant of law and that the sub-

poena issued and served upon appellant pursuant thereto is a nullity.

No jurisdiction therefore is conferred upon the Commission over the affairs of appellant by reason of anything contained in Order No. 79.

Accordingly, to compel appellant to appear and testify concerning any facts and information in his possession in respect of the matters set forth in Order No. 79 would violate his liberty as guaranteed by the Fifth Amendment to the Constitution of the United States.

The argument and reasons in support of Point I are equally applicable to Point II herein and it is respectfully asked that they be considered as repeated under this Point.

It need only be added that an attempted classification of applicants for licenses who are engaged in the newspaper publishing business for the purpose of differentiation from all other persons solely by reason of the fact of association with newspapers would constitute an injurious discrimination in violation of the Fifth Amendment to the Constitution of the United States.¹⁹ Such injurious discrimination would result if the classification were to operate in favor of applicants associated with newspapers. Likewise, an injurious discrimination would result if the classification were established for the purpose of disqualifying persons associated with newspapers from engaging in the radio broadcasting field. In the latter event it would violate appellant's rights as a publisher of a newspaper.²⁰

¹⁹ Cf. *Currin v. Wallace*, 306 U. S. 1 (1939); *Grosjean v. American Press Co.*, 297 U. S. 233 (1936).

²⁰ See cases cited in note 19, *supra*.

POINT III.

Order No. 79 does not purport to undertake the investigation in controversy for the purpose of making recommendations to Congress. Even if it did so order, the investigation would constitute a general fact-finding inquiry beyond the power of the Commission.

The Commission will doubtless contend here, as it did below, that its investigation is authorized by Section 403 of the Act²¹ to assist the Commission in the administration of the licensing provisions of the Act.

Since Order No. 79 as heretofore shown on its face exceeds the powers conferred upon the Commission under the Act, it derives no aid from the broad terms of Section 403.

Order No. 79 is not an inquiry "as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision" of the Act. No complaint can be made on the ground that ownership of a newspaper or association with a newspaper is in and of itself a basis of preference or of disqualification in passing upon applications for a license.

Moreover, Order No. 79 was not issued pursuant to a complaint or violation of the Act or in connection with a specific application for a license or its renewal, modification or transfer. No party or parties respondent are named.

By the same token Order No. 79 does not constitute an inquiry "concerning which any question may arise under any of the provisions" of the Act. In the *Tri-State Broadcasting Company* case this Court said that no provision of the Act or rule of law forbade broadcasting by newspapers.²² The *Sanders* case precludes consideration or adoption by the Commission of a policy or rules by which

²¹ For text of section see Appellant's App. at page 55.

²² See note 11, *supra*.

persons associated with newspapers *because of that fact and only that fact* can be preferred or disqualified as applicants for station licenses.

Order No. 79 does not relate "to the enforcement of the provisions" of the Act but rather purports to legislate standards in addition to those set forth in Sections 307 and 309 and to legislate limitations going beyond those provided in Sections 310 and 311 of the Act.

Nor can Order No. 79 become lawful by reason of the further provision in Section 403 that the Commission shall have the same powers in proceeding with an inquiry on its own motion as in the case of a complaint or petition to or before it since its powers can be no broader than those specifically conferred by the Act itself.

Accordingly, Order No. 79 is beyond any lawful power of the Commission under the Act. In the absence of such statutory authority the investigation must be branded as a usurpation of power contrary to the clearly expressed intention of Congress.

The Commission also asserted in the court below that its investigation will be of assistance in reporting to Congress with respect to the advisability of further legislation pursuant to Section 4 (k) of the Act.²³ No such purpose is stated in Order No. 79 and hence it is irrelevant to this proceeding.²⁴ On the contrary, as previously shown, the face of the order proclaims as its sole purpose an investigation to determine what statement of policy or rules *should be issued and applied by the Commission* in connection with applications of persons associated with one or more newspapers.

²³ For text of section see Appellant's App. at page 51.

²⁴ It would violate the rudimentary requirements of fair play—due process—to permit the Commission to inject issues extraneous to the terms of Order No. 79 into this proceeding by statements in press releases or by oral statements of individual members of the Commission made subsequent to the issuance of said Order.

The legality of an inquiry by the Commission must be governed by the terms of the order which initiated it. Order No. 79 is a far cry from the alleged purpose of reporting to Congress or making recommendations to Congress for additional legislation.

But even if Section 4 (k) is deemed to be put in issue by Order No. 79, the Commission still lacks the power to conduct the inquiry herein. Section 4 (k) of the Act is typical of similar sections in other statutes which require an annual report of the agency to Congress. It is well known that such annual reports often contain recommendations for additional legislation, even if this is not specifically provided as in Section 4 (k) of the Act herein. But it does not follow that the Commission can give color of legality to any administrative activity or inquiry merely because the ultimate result might be to acquire information for inclusion in its annual report to Congress or as a basis of recommendations for additional legislation.

In an investigation instituted by its order, the Commission can demand only such information as is relevant to a lawful inquiry. Such an inquiry must fall within the boundaries of the powers conferred upon the agency by Congress. If the Commission strays beyond these boundaries, it cannot take shelter in Section 4 (k) for it is obvious that the aforesaid section cannot be used as a lever to enlarge the scope of the investigatory powers in Section 403.²⁵ It has already been shown that Order No. 79 exceeds the authority conferred by Section 403 because it exceeds the regulatory authority conferred by the Act itself.²⁶

To accept the Commission's interpretation of Section 4 (k) would lead to the untenable conclusion that the Com-

²⁵ For this reason the court below erred in holding that the Commission acted within its authority to make recommendations for proposed legislation "germane to the field which the Act gives it the power to regulate". (Appellant's App. at page 39.)

²⁶ See note 13, *supra*.

mission's inquisitorial powers are as broad as the regulatory powers of Congress itself in the field of communications. This is patently untenable. Investigations by Congress may extend to any subject over which Congress has the power to enact valid legislation.²⁷ The Commission's powers of investigation by testimonial compulsion can be no broader than the scope of the regulatory powers conferred upon it under the Act.²⁸

It is anomalous to suppose that the direction to the Commission in Section 4 (k) to make annual reports, including such recommendations as the Commission may deem necessary, has the effect of giving the Commission authority to subpoena witnesses and to command the production of books, papers and records relevant to any subject within the field of possible valid legislation concerning radio communications.

This is not to say that the Commission may not report or make recommendations to Congress in the field just mentioned on the basis of its administration of the regulatory powers conferred upon it under the Act. The Commission's experience with the Act as written may disclose the need for amendments. In the course of its lawful administration it may gather data which will be deemed of sufficient value for inclusion in its report or which may suggest the need for amendments. Such conduct would be within the bounds of the Act and is clearly distinguishable from the power asserted by the Commission in reliance upon Section 4 (k).

Even if Order No. 79 purported to undertake the investigation in controversy for the purpose of making recommendations to Congress, which it does not, appellant contends

²⁷ *McGrain v. Dougherty*, 273 U. S. 135 (1927) reviewing prior cases on the subject.

²⁸ See notes 30 and 31, *infra*.

that the investigation would be a general fact-finding inquiry beyond the power of the Commission.²⁹

The Commission's belated assertion in the court below that the investigation initiated by Order No. 79 is in aid of recommending additional legislation to Congress must be considered as a contention that it can investigate any matter in the field of radio communications. This is so because Order No. 79 was not issued in response to any complaint or cause. It named no party respondent or parties respondent. It is not addressed to a specific application or to conflicting applications. Order No. 79 was not issued to inform the Commission for the purpose of applying the standard of "public interest, convenience, or necessity" to the circumstances surrounding particular applications within the boundaries delimited by the *Sanders* case.

This is not the first time that an administrative agency has asserted power to engage in a general fact-finding inquiry of the broad scope claimed by the Commission herein.

In *Harriman v. Interstate Commerce Commission*, 211 U. S. 407 (1908), the Interstate Commerce Commission, on its own motion and in absence of a specific complaint, ordered an investigation into consolidation and combinations of carriers subject to the Interstate Commerce Act to the end that it might be ascertained whether such arrangements resulted in violations of the Act or tended to defeat its purposes.

The Supreme Court through Mr. Justice Holmes condemned "the enormous scope of power asserted by the Commission" as beyond any authority conferred by Congress under the Act. The purpose of the Act, said the Supreme

²⁹ Appellant is compelled to argue this point because it was injected into the proceeding by the Commission. In reality, this question is not embraced within the terms of Order No. 79, as heretofore demonstrated.

Court, embraced only complaints for violation thereof and investigations by the Commission upon matters that might have been the object of a complaint.³⁰

³⁰ Mr. Justice Holmes said:

"The contention of the Commission is that it may make any investigation that it deems proper, not merely to discover any facts tending to defeat the purposes of the act of February 4, 1887, but to aid it in recommending any additional legislation relating to the regulation of commerce that it may conceive to be within the power of Congress to enact; and that in such an investigation it has power, with the aid of the courts, to require any witness to answer any question that may have a bearing upon any part of what it has in mind. The contention necessarily takes this extreme form, because this was a general inquiry started by the Commission of its own motion, not an investigation upon complaint, or of some specific matter that might be made the object of a complaint. To answer this claim it will be sufficient to construe the act creating the Commission, upon which its powers depend.

"Before taking up the words of the statute the enormous scope of the power asserted for the Commission should be emphasized and dwelt upon. The legislation that the Commission may recommend embraces, according to the arguments before us, anything and everything that may be conceived to be within the power of Congress to regulate, if it relates to commerce with foreign nations or among the several states. And the result of the arguments is that whatever might influence the mind of the Commission in its recommendations is a subject upon which it may summon witnesses before it and require them to disclose any facts, no matter how private, no matter what their tendency to disgrace the person whose attendance has been compelled. If we qualify the statement and say only legitimately influence the mind of the Commission in the opinion of the court called in aid, still it will be seen that the power, if it exists, is unparalleled in its vague extent. * * *

"How far Congress could legislate on the subject-matter of the questions put to the witnesses was one of the subjects of discussion, but we pass it by. Whether Congress itself has the unlimited power claimed by the Commission, we also leave on one side. It was intimated that there was a limit in *Interstate Commerce Commission v. Brimson*, 154 U. S. 447 * * *. Whether it could delegate the power, if it possesses it, we also leave untouched, beyond remarking that so unqualified a delegation would present the constitutional difficulty in most acute form. It is enough for us to say that we find no attempt to make such a delegation anywhere in the act.

"Whatever may be the power of Congress, it did not attempt, in the Act of February 4, 1887 * * * to do more than to regulate the interstate business of common carriers, and the primary purpose

Sixteen years later Mr. Justice Holmes in *Federal Trade Commission v. American Tobacco Company*, 264 U. S. 298 (1924), branded as an illegal "fishing expedition" a similar attempt by the Federal Trade Commission to embark, pursuant to a Senate Resolution, upon an inquiry into the private affairs of a citizen of the United States. The views expressed by him in the *Harriman* case were confirmed without qualification.

Both cases rest upon the fundamental principle that an investigation of an administrative agency must be auxiliary to a lawful power within the act creating it. In neither case did the Court pass upon the question of the power of Congress to delegate to the Commission the unqualified power asserted. In the *Harriman* case Mr. Justice Holmes remarked that this "would present the constitutional difficulty in most acute form".

The principles of these cases remain unshaken. *Smith v. Interstate Commerce Commission*, 245 U. S. 33 (1917) decided nothing to the contrary.

In the *Smith* case the Interstate Commerce Commission was directed by Senate Resolution to investigate the financial relations and practices of certain railroads. Paragraph 12 of the Resolution authorized an inquiry into the contributions of railroads to political campaign funds and expenditures for lobbying. The Commission consolidated this investigation with another hearing on a specific complaint concerning the issuance of free passes.

for which the Commission was established was to enforce the regulations which Congress had imposed.

"* * * the power to require testimony is limited, as it usually is in English-speaking countries, at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law." (217 U. S. at pages 417-420.)

Smith, who was subpoenaed as a witness, refused to answer questions concerning political contributions by his company and the manner of their accounting on the books of the said company. The Court affirmed an order requiring the witness to answer the questions.

The decision in the *Smith* case was placed on the narrow ground that by Section 20³¹ of the Interstate Commerce Act Congress had specifically conferred upon the Commission power to inquire into the expenditures of common carriers and methods of accounting. Mr. Justice McKenna said that the question before the Supreme Court was "quite special"; that the subject matter of the investigation was specific and "more immediate to the function of the Commission" than in the *Harriman* case.

This conclusively establishes that the broadening of the Interstate Commerce Commission's investigatory powers by amendment of Section 13³² of the Interstate Commerce Act subsequent to the *Harriman* case, in terms similar to that of Section 403 of the Act herein, was not made the basis of the decision in the *Smith* case. Justice McKenna emphasized that the questions in issue were not "of broad extent". All the Court decided was that the power asserted clearly fell within Section 20 of the Interstate Commerce Act.

It would be erroneous to argue, therefore, that the *Smith* case overruled the *Harriman* case or limited its principles. Mr. Justice Holmes, who sat on the unanimous court that decided the *Smith* case, would not have remained silent had he considered that his opinion in the *Harriman* case was being modified. He fully realized that the assertion of

³¹ 24 Stat. 386 as amended in 34 Stat. 593; 49 U. S. C., Sec. 20.

³² 24 Stat. 383 as amended in 36 Stat. 550; 49 U. S. C., Sec. 13.

power in the *Smith* case was as limited as that in the *Harriman* case was broad. He said nothing to the contrary in the *American Tobacco Company* opinion.

All three cases support the conclusion that no matter how broad the terms of the investigatory provisions of the statute may be, an investigation by an administrative tribunal on its own motion or pursuant to congressional resolution must be ancillary to a lawful purpose embraced by the powers granted in the statute.

None of the cases dealt with the question of the extent of the congressional power of legislation over the subject matter involved or the question whether Congress could delegate such power, if it possessed it.

The same distinctions are applicable to the present proceeding. Here the Commission is seeking power as broad as that sought in the *Harriman* and *American Tobacco Company* cases and not power as narrow as that put in issue in the *Smith* case. Broad as the language of Section 403 may be, it provides no shelter since Order No. 79 is not within the confines of Section 403. On the contrary, Order No. 79 falls outside the Act itself.

Finally, another feature of prime significance in the present appeal which calls for comparison with the cases just discussed is the explicit recognition by the Supreme Court in the *Sanders* case that broadcasters are not common carriers and are not to be dealt with as such; that Congress has not abandoned the principle of free competition in the field of broadcasting as it has done in the case of railroads.

This distinction means that the doctrine of the *American Tobacco Company* case is the one most directly applicable to the issue under consideration herein. In the light of the sharp separation in the Act of common carriers and radio

broadcasters, as judicially recognized in the *Sanders* decision, it is beyond cavil that, regardless of what view may be taken of the effect of the *Harriman* and *Smith* decisions, the Commission herein cannot assert broad powers of investigation based upon the same theory as in the case of common carriers.³³

Perhaps nothing better reveals the unprecedented scale of power sought by the Commission in this case than its flat statement that

“* * * it seems inconceivable to us that an argument could be seriously advanced against *the inherent power of any administrative agency*, endowed by statute with power to hold hearings, issue subpoenas, etc., to conduct general hearings of the type involved here.” (Emphasis supplied.)³⁴

The only powers which the Federal Communications Commission has are the powers conferred upon it by Congress to enforce the standards and limitations included within the Act. Order No. 79 exceeds those powers and the said Order and subpoena served upon appellant pursuant thereto are therefore without force of law.

How far Congress could legislate on any subject not included in the Act or what the Commission thinks Congress could do on a particular subject not included therein are irrelevant in this proceeding grounded upon Order No. 79. It is sufficient to say that the Commission cannot usurp the legislative function.

³³ In both the *Harriman* and *Smith* cases the Court recognized that the scope of the investigatory powers of administrative agencies depends in part at least upon the nature of the business regulated.

³⁴ Federal Communications Commission, Docket No. 6051, Decision and Order on Motion to Vacate Order, July 23, 1941 (Appellant's App. at page 34).

Conclusion.

WHEREFORE, appellant prays that the judgment of the court below be reversed, that its Order be set aside and that the case be remanded with directions to dismiss the application of the Commission.

Respectfully submitted,

ELISHA HANSON,
Attorney for Appellant,
James G. Stahlman.

HAROLD L. CROSS, JR.,
LETITIA ARMISTEAD,
Of Counsel.

October, 1941.

APPENDIX

**United States Court of Appeals for the
District of Columbia**

No. 8039

JAMES G. STAHLMAN, APPELLANT,

v.

**FEDERAL COMMUNICATIONS COMMISSION,
APPELLEE.**

APPELLANT'S APPENDIX.

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District Court of the United States

FOR THE DISTRICT OF COLUMBIA

SPECIAL No. 127.

**FEDERAL COMMUNICATIONS COMMISSION,
APPLICANT,**

v.

JAMES G. STAHLMAN, RESPONDENT.

BE IT REMEMBERED, that in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Application for an Order Requiring Appearance Pursuant to Subpoena.

Filed Aug. 2, 1941.

The Federal Communications Commission, pursuant to Section 409(c) and (d) of the Communications Act of 1934, as amended, (47 U. S. C. § 409(c)(d)), applies to this Honorable Court for an order requiring James G. Stahlman to appear before it as required by a subpoena issued by the Commission, and respectfully represents as follows:

I.

Jurisdiction is conferred upon this Court by Section 409(d) of the Communications Act of 1934, as amended (47 U. S. C. § 409(d)).

II.

On March 20, 1941, the Federal Communications Commission issued its Order No. 79 directing that an investigation be undertaken to determine what statement of policy or rules, if any, should be made concerning applications for high-frequency (FM) broadcast stations by persons also associated with the publication of one or more newspapers, and concerning the future acquisition of standard broadcast stations by such persons. This Order was supplemented by Order No. 79-A, issued July 1, 1941, setting forth the issues on which testimony would be taken. Copies of the Commission's Orders No. 79 and 79-A are annexed hereto marked Exhibits A and B, respectively.

III.

On July 1, 1941, Ray C. Wakefield, a Commissioner, was duly designated by the Commission to sign subpoenas in connection with the matter of the proceedings under Commission Order No. 79, Commission Docket No. 6051. A certified copy of the minute of such action by the Commission is annexed hereto marked Exhibit C. On July 29, 1941, Commissioner Wakefield issued a subpoena, a copy of which is annexed hereto marked Exhibit D, directed to the respondent, James G. Stahlman, requiring said respondent to appear before the Commission at Hearing Room A, Interstate Commerce Commission Building, in Washington, D. C. on the 1st day of August, 1941, at 10 o'clock A. M. to testify concerning the matters being investigated under said Orders No. 79 and 79-A. Service on respondent was made on the 29th day of July, 1941, by exhibiting the original subpoena, of which Exhibit D is a copy, to James G. Stahlman, and by leaving a copy of said subpoena with him, as is shown by the copy of the return of service appearing on Exhibit D.

IV.

On information and belief:

Respondent, James G. Stahlman, is the publisher of the *Nashville Banner*, a newspaper of daily general circu-

lation in Nashville, Tennessee. The respondent has in times past been president of the American Newspaper Publishers Association and of the Southern Newspaper Publishers Association, and vice chairman of the Publishers National Radio Committee, which was formed by the American Newspaper Publishers Association Radio Committee in 1932. From 1935 through 1937, inclusive, the respondent was a member of the Radio Committee of the American Newspaper Publishers Association, to which was delegated the study of the policy to be adopted by that association in matters relating to radiobroadcasting, including the question of the ownership of radio stations by newspapers.

V.

On information and belief:

As publisher of the *Nashville Banner*, as president of the American Newspaper Publishers Association and of the Southern Newspaper Publishers Association, as a member of the Radio Committee of the American Newspaper Publishers Association, and as vice chairman of the Publishers National Radio Committee, James G. Stahlman is in possession of facts and information deemed relevant by the Commission to its investigation under Orders Nos. 79 and 79-A, and essential to the proper carrying out of that investigation.

VI.

Respondent, James G. Stahlman, failed to appear on August 1, 1941, as required by the subpoena. The refusal of said James G. Stahlman to appear has impeded and continues to impede the progress of the hearing.

WHEREFORE, Federal Communications Commission respectfully prays:

(a) That an order to show cause issue forthwith directing the respondent, James G. Stahlman, to appear before this Court upon a day certain to be fixed in said order, and show cause, if any there be, why an order should not issue requiring said respondent to appear before said Commission,

or an officer properly designated by it, to testify concerning the matters being investigated under Commission Orders Nos. 79 and 79-A.

(b) That upon return of the order to show cause, an order issue requiring the respondent, James G. Stahlman, to appear before said Commission, or an officer properly designated by it, to testify concerning the matters being investigated under Commission Orders Nos. 79 and 79-A.

(c) That the Applicant, Federal Communications Commission, have such other and further relief as may be necessary and appropriate.

	FEDERAL COMMUNICATIONS COMMISSION,
	By
(Sgd.)	TELFORD TAYLOR,
	<i>General Counsel.</i>
(Sgd.)	THOMAS E. HARRIS,
	<i>Assistant General Counsel.</i>
(Sgd.)	NATHAN H. DAVID,
	<i>Counsel.</i>
(Sgd.)	HARRY M. PLOTKIN,
	<i>Counsel.</i>

TELFORD TAYLOR, being first duly sworn upon his oath deposes and says that he is General Counsel for the Federal Communications Commission: that the filing of the application annexed hereto has been duly authorized by the said Commission: that he has read the foregoing application duly executed by him and knows the contents thereof to be true of his own knowledge, except for such matters as are alleged on information and belief, and as to them he is informed and believes the same to be true.

(Sgd.)	TELFORD TAYLOR.
--------	-----------------

Subscribed to and sworn before me this 1st day of August, 1941.

(Sgd.)	STEPHEN J. TUHY, JR.,
	<i>Notary Public.</i>

My Commission expires Oct. 14, 1943.

EXHIBIT A.

Federal Communications Commission.

Washington, D. C.

March 20, 1941.

ORDER No. 79.

Whereas, under the provisions of the Communications Act of 1934, as amended, the Federal Communications Commission is empowered and directed to grant licenses for radio broadcast stations only after a determination that "public interest, convenience, or necessity" would be served thereby; and

Whereas, the question whether the granting of a license is in the "public interest, convenience, or necessity" where it results in common control of one or more radio stations and one or more newspapers has been presented to the Commission from time to time and has been the subject of debate before the Commission and elsewhere; and

Whereas, there are now pending before the Commission a large number of applications for high frequency broadcast stations (FM) with which are associated persons also associated with the publication of one or more newspapers; and

Whereas, the Commission desires at this time to obtain full and complete information for the guidance of the Commission in passing upon applications for high frequency broadcast stations (FM) with which are associated persons also associated with the publication of one or more newspapers; and

Whereas, the Commission deems it advisable at this time, when the public service of frequency modulation is in its early stages, to consider the adoption of a policy with respect to joint control of radio stations and newspapers, such policy to be applied by the Commission in passing upon high frequency broadcast applications (FM) coming before it and to guide and inform future applicants; and

Whereas, the Commission deems it advisable at the same time that it undertake consideration of the question of joint

control of newspapers and radio with respect to applications for high frequency broadcast stations (FM) to consider the adoption of a policy to be applied by it in passing upon applications for the future acquisition of standard broadcast stations by newspapers;

Now, Therefore, It is Hereby Ordered That the Federal Communications Commission undertake an immediate investigation to determine what statement of policy or rules, if any, should be issued concerning applications for high frequency broadcast stations (FM) with which are associated persons also associated with the publication of one or more newspapers and that public hearings with respect thereto be held at such times and such places as the Commission may direct, and that such investigation and public hearings shall also include consideration of statements of policy or rules, if any, which should be issued concerning future acquisition of standard broadcast stations by newspapers.

It is Further Ordered That in those few cases in which the Commission has heretofore granted applications for high frequency broadcast stations (FM) with which are associated persons also associated with the publication of one or more newspapers, the construction permits to be issued shall contain the condition that no construction of the facilities authorized therein shall be undertaken or continued until after the Commission shall have completed the aforesaid investigation and shall have taken action upon the basis thereof; Provided, however, that, upon a showing that the public interest, convenience or necessity will be served thereby, construction at an earlier date may be authorized.

By the Commission.

(Sgd.) T. J. SLOWIE,
Secretary.

EXHIBIT B.

Federal Communications Commission.

Washington, D. C.

July 1, 1941.

ORDER No. 79-A.

Whereas, the Commission by Order No. 79 (March 20, 1941) directed that an investigation be undertaken "to determine what statement of policy or rules, if any, should be issued concerning applications for high frequency broadcast stations (FM) with which are associated persons also associated with the publication of one or more newspapers and that public hearings with respect thereto be held at such times and such places as the Commission may direct, and that such investigation and public hearings shall also include consideration of statements of policy or rules, if any, which should be issued concerning future acquisition of standard broadcast stations by newspapers";

Now, Therefore, It is Ordered, That, pursuant to the aforesaid order, testimony and other evidence be taken with reference to the following matters, in addition to such other matters as the Commission may from time to time direct:

1. To what extent broadcast stations are at present associated with persons also associated with publication of one or more newspapers, the classification (in terms of power, location, network affiliation, etc.) of broadcast stations so associated, the circumstances surrounding such association, and the tendency toward such association in the future.

2. Whether joint association of newspapers and broadcast stations tends or may tend to prejudice the free and fair presentation of public issues and information over the air, or to cause editorial bias or distortion, or to inject editorial policy or attitude into the public service rendered by broadcast stations as a medium of public communication.

3. Whether joint association of newspapers and broadcast stations tends or may tend to restrict or distort the broadcasting of news, or to limit the sources of news to the public, or to affect adversely the relation between news-gathering services and broadcast stations.

4. Whether the joint association of newspapers and broadcast stations has or may have any effect upon freedom of access to the radio forum, for the discussion of public issues.

5. Whether the joint association of newspapers and broadcast stations tends or may tend to lessen or increase competition among broadcast stations or to result in the monopolization of local broadcast facilities.

6. Whether the joint association of newspapers and broadcast stations tends or may tend to increase or decrease concentration of control over broadcast facilities or the use thereof.

7. Whether the joint association of newspapers and broadcast stations constitutes or may constitute an undue concentration of control over the principal media for public communication.

8. Whether joint association of newspapers and broadcast stations tends or may tend to result in the utilization of improved facilities and skilled, experienced personnel for the procuring and dissemination of information and opinion by broadcast stations.

9. Whether joint association of newspapers and broadcast stations tends or may tend to insure greater economic stability for broadcast stations and to encourage the maximum technological development of radio.

10. What considerations influence newspaper interests to acquire broadcast stations.

FEDERAL COMMUNICATIONS COMMISSION,
(Sgd.) T. J. SLOWIE,
Secretary.

EXHIBIT C.**UNITED STATES OF AMERICA, FEDERAL
COMMUNICATIONS COMMISSION.**

Washington, D. C., August 1, 1941.

I hereby certify that the attached is a true copy of an Excerpt from Minute #360-41 dated July 1, 1941, of the Minutes of the Federal Communications Commission on file in this Commission, and that I am the proper custodian of the same.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Federal Communications Commission to be affixed, this first day of August, 1941.

(Sgd.) T. J. SLOWIE,
Secretary.

[SEAL.]

**EXCERPT FROM MINUTES OF THE FEDERAL COMMUNICATIONS
COMMISSION.**

Minute #360-41. July 1, 1941. 11:00 A. M.

Present: Commissioners Fly, Chairman; Wakefield, Walker and Payne.

Broadcast Matters.

HEARING DOCKET.

The Commission designated Commissioner Wakefield to sign subpoenas in connection with the matter of the proceedings under Commission Order No. 79, Docket No. 6051.

(S.) T. J. SLOWIE,
Secretary.

EXHIBIT D.

(Front)

UNITED STATES OF AMERICA, FEDERAL
COMMUNICATIONS COMMISSION.

Docket No. 6051.

In the Matter of Order No. 79.

The President of the United States of America.

To James G. Stahlman, Office of Public Relations, Navy
Department, Washington, D. C., Greeting:

You Are Hereby Commanded under penalty of law to be
and appear in your proper person before the Federal Com-
munications Commission
(Name and official title of person authorized to take deposi-
tions) at Hearing Room A, Interstate Commerce Commis-
sion (Address) 12th and Constitution Ave., (City) Wash-
ington, (State) D. C., on August 1, 1941, at 10:00 o'clock
A. M., then and there to testify in the above-entitled cause
now pending before this Commission.

By Order of the Federal Communications Commission,
this 29th day of July, 1941.

[SEAL.]

(Sgd.) RAY C. WAKEFIELD,
Commissioner for the Commission.

NOTICE: Witness fees and mileage for attendance under
this subpoena for service hereof are to be paid by the party
at whose instance the witness is subpoenaed, and every
copy of this summons for the witness must contain a copy
of this notice.

Service of subpoenas may be made by any citizen of the
United States over the age of 21 years and competent to be
a witness, and not a party to or in any way interested in the
proceeding.

EXHIBIT D.

(Back)

PROOF OF SERVICE.

STATE OF WASHINGTON,
County of Dist. of Col., ss:

Joseph F. Miller, being first duly sworn, says:

I am a citizen of the United States of America, over the age of twenty-one years, and not a party to or in any way interested in the proceeding in which this subpoena was issued.

On the 29 day of July, 1941, I served the within subpoena on the witness named therein at the address shown, by—
 (Check method used.)

- ✓ (1) Delivering to and leaving with the witness personally a copy of said subpoena and at the same time exhibiting to said witness this original, (or if not able to effect service in this manner)
- (2) By sending a copy of the within subpoena to the witness by registered mail, or
- (3) By leaving a copy at the principal office or place of business, to wit:

on the 29th day of July, 1941.

(Sgd.) JOSEPH F. MILLER.

Subscribed and sworn to before me this 29th day of July, 1941.

(Sgd.) PANSY E. WILTSHIRE,
Notary Public.

I certify that the person named herein was in attendance as a witness at on
 (Day, month and year)

.....
 (Name of person certifying)

.....
 (Official title)

Order to Show Cause.

Filed Aug. 2, 1941.

Upon duly verified application of the Federal Communications Commission, filed herein on the 2nd day of August, 1941, and for good cause appearing therefor,

It Is Hereby Ordered, that the respondent, James G. Stahlman, appear before this court on August 11, 1941, and show cause, if any he has, why an order should not issue requiring him to appear before the Federal Communications Commission, or an officer properly designated by it, to testify concerning the matters being investigated under Commission Orders Nos. 79 and 79-A.

It Is Further Ordered, that service of a copy of this Order to Show Cause, together with the copies of the application and the affidavit filed herein, be made on said respondent before the 5th day of August, 1941.

(Sgd.)

JAS. W. MORRIS,
District Judge.

Dated August 2, 1941.

Return to Order to Show Cause and Answer to Application.

Filed Aug. 11, 1941.

The respondent, James G. Stahlman, in response to the order entered by this Honorable Court on the 2d day of August, 1941, now appears through his counsel, Elisha Hanson, and makes response to said order to show cause

“why an order should not issue requiring him to appear before the Federal Communications Commission, or an officer properly designated by it, to testify concerning the matters being investigated under Commission Orders Nos. 79 and 79-A”

as follows:

1. The Commission has no power or authority under the act to adopt or apply any policy or promulgate rules the

purpose and effect of which would be to bar persons, firms or corporations engaged in the newspaper publishing business from engaging in the radio broadcasting business.

2. No jurisdiction over respondent or respondent's affairs is conferred upon the Federal Communications Commission by reason of anything contained in Commission's Orders Nos. 79 and 79-A.

3. The Commission is without authority under the Act (Federal Communications Act of 1934, As Amended) to issue its Order No. 79 and its Order No. 79-A and to conduct the inquiry in which it is now engaged pursuant to the aforesaid Orders for the following reasons:

(a) The Commission is without authority under the Act governing its operations to adopt or apply any policy or promulgate rules for its guidance or issue any order in the consideration of applications now pending or applications that may be filed in the future the purpose and effect of which would be to enlarge the standards or criteria for or extend the limitations upon the granting of licenses as set forth in Section 307 (a) (b) and (d) of the Communications Act of 1934, as Amended.

(b) The Commission is without authority under the Act governing its operations to adopt or apply any policy or promulgate rules for its guidance or issue any order in the consideration of applications now pending, applications that may be filed in the future, or renewal applications the purpose and effect of which would be to extend the limitations on the holding and transfer of licenses as set forth in Section 310 (a) and (b) of the Communications Act of 1934, As Amended.

(c) The Commission is without authority under the Act governing its operations to adopt or apply any policy or promulgate rules for its guidance or issue any order in consideration of refusal of licenses and permits in certain cases arising under Section 311 of the Communications Act of 1934, as Amended, the purpose and effect of which would be to extend the provisions of that section to persons other than those specifically referred to therein.

(d) The Commission is without authority through statements of policy, the adoption or application of such policy, or through the promulgation of rules and regulations to legislate on the question of who shall or shall not be entitled to receive approval of applications for radio broadcast licenses, of whatever kind or description, or approval of applications for renewal or transfer of such licenses.

(e) The Commission is without authority to adopt or apply a policy or promulgate rules providing for the classification of persons, who are citizens of the United States, for the purpose of disqualifying any persons belonging to a particular class because of their belonging to that class from receiving approval of their applications for radio broadcast licenses or renewal thereof, from holding radio broadcast licenses or from receiving approval of applications for the transfer of such licenses from others to them.

(f) The Commission, being without authority to adopt or apply a policy or promulgate rules concerning the matters specified in its Order No. 79, as elaborated in its Order No. 79-A, it is without authority to conduct any inquiry into the subject to determine what statement of policy or rules, if any, should be issued concerning applications for high frequency broadcast stations (FM) with which are associated persons also associated with the publication of one or more newspapers or to determine what statement of policy or rules, if any, should be issued concerning future acquisition of standard broadcast stations by newspapers.

(g) The Commission is without authority to conduct a general inquiry into the newspaper publishing business pursuant to its Order No. 79, as elaborated in its Order No. 79-A, and further elaborated in its questionnaire dated June 28, 1941 (annexed hereto and marked Exhibit "A"), sent out to stations licensed by the Commission.

4. The purported subpoena alleged to have been issued and served upon this respondent shows on its face that it is a nullity, issued and served without warrant or authority of law, and solely for the purpose of compelling respondent to testify "In the Matter of Order No. 79", which order in turn shows on its face that the Commission is acting beyond

any power or authority conferred by the Act for the reasons hereinbefore set forth in paragraph 3 herein.

5. The attempt by the Commission to compel respondent to appear and testify in the matter of its Order No. 79 violates respondent's right as guaranteed by the Fifth Amendment to the Constitution of the United States.

Further responding, and in particular in answer to the application of petitioner, respondent

1. As to paragraph I of the Application, denies that this Court has jurisdiction under the Act to enforce the purported subpoena, alleged to have been issued and served by the Commission pursuant to Commission's Order No. 79 for the reasons hereinbefore set forth in paragraphs 3 and 4 herein.

2. As to paragraph II of the Application, admits that on March 20, 1941, the Federal Communications Commission issued its Order No. 79 undertaking an immediate investigation to determine what statement of policy or rules, if any, should be issued concerning applications for high frequency broadcast stations (FM) with which are associated persons also associated with the publication of one or more newspapers and also what statements of policy or rules, if any, should be issued concerning future acquisition of standard broadcast stations by newspapers. Denies that the Commission has any power under the Act to issue such order, issue any statement of policy or rules such as described therein, or to classify persons engaged in the newspaper publishing business so as to extend the disqualifications of applicants as those disqualifications are precisely set forth in the Act. Admits that on July 1, 1941, the Commission issued its Order No. 79-A wherein it set forth the specific matters with reference to which it proposed to take testimony and other evidence pursuant to the inquiry ordered by its Order No. 79. Denies that the Commission has any authority under the Act to issue its Order No. 79-A, to inquire into the matters set forth therein, or issue any statement of policy or rules in respect of such matters. Except as herein admitted or denied, denies each

and every allegation in said paragraph II of the Application.

3. Admits that on July 29, 1941, a paper, purporting to be a subpoena of the Commission, signed by Ray C. Wakefield, commanding respondent to appear before the Commission at Hearing Room A, Interstate Commerce Commission Building, in Washington, D. C., at 10:00 A. M., August 1, 1941, was shown to respondent and a copy thereof left with him. Denies that such paper purported to require respondent to appear in any matter other than "In the Matter of Order No. 79" as is more fully shown upon Exhibit "D" attached to the Commission's application. Further answering the allegations of said paragraph III of the Application, respondent respectfully shows that under date of July 10, 1941, the Commission, by T. J. Slowie, its Secretary, addressed a letter to respondent, wherein the Commission informed him of its desire to take his testimony as follows:

"At hearings before the Commission beginning July 23, 1941, in connection with the investigation authorized under Order No. 79 with respect to the joint association of newspapers and radio stations, the Commission is planning to receive testimony concerning the past and present relations between the radio industry and the radio networks on the one hand, and the newspaper industry and the press services on the other with respect thereto. The Commission will inquire into the arrangements made in the past for the broadcasting of news, the part played by radio stations associated with newspapers in the broadcasting of news, the availability of newspaper reports to broadcasters, the collection of news for radiobroadcasting, and other related matters coming within the scope of the topics set forth in Order No. 79-A, a copy of which is enclosed for your information. Your personal knowledge and experience with respect to these matters will materially assist the Commission in obtaining information with reference to the matters set forth in Order No. 79.

"You are, accordingly, notified hereby that the Commission desires your testimony with respect to these matters in

so far as they come within your personal knowledge and experience, and you are requested to appear before the Commission on Thursday, July 24 for the purpose of giving such testimony unless you are hereafter notified to the contrary. Within a few days a subpoena calling for your appearance will be served upon you. You will, of course, be entitled to receive all allowable witness fees and travel expenses."

Still further answering the allegations of said paragraph III respondent shows that on the 19th day of July, 1941, a person representing himself to be an agent of the Commission handed him a paper purporting to be a subpoena of the Commission commanding respondent to appear before the Federal Communications Commission at Federal Archives Building Auditorium, Washington, D. C., on July 25, 1941, at 10:00 A. M. to testify "In the Matter of Order No. 79"; that upon information and belief no hearing was held by said Commission at that place at the time designated; that on July 28, 1941, another paper purporting to be a subpoena of the Commission commanding him to appear before the Federal Communications Commission at Hearing Room A, Interstate Commerce Commission, on August 1, 1941, at 10:00 A. M. was left in respondent's office at the U. S. Navy Department, Washington, D. C., where respondent, an officer in the United States Naval Reserve, is now on active duty; that on the following day the paper purporting to be a subpoena, a copy of which is attached to the Application and marked Exhibit "D", was handed to him at the Departmental Auditorium where he had gone on official business; that on July 29, 1941, the Commission over the signature of its Secretary addressed a letter to respondent wherein it stated as follows:

"The subpoenas dated July 19 and July 28, 1941, served upon you on July 22 and July 28, 1941, respectively, in connection with the hearings being held under the Commission's Order No. 79 are hereby cancelled. You are directed to disregard the above-described subpoenas which are now superseded by the subpoena dated July 29, 1941, and served upon you on the same day. Pursuant to said subpoena of July 29, 1941, you are required to appear before the Com-

mission at Hearing Room A, Interstate Commerce Commission, on August 1, 1941, at 10:00 A. M.'";

that respondent referred each and every one of the three papers herein described, to Elisha Hanson, his attorney, who advised him that each showed on its face it was a nullity, inasmuch as it purported to command him to appear and testify in a proceeding not authorized by the Act and about matters concerning which the Commission is without any power or authority to issue any statement of policy or rules, for which reasons respondent was not required to appear; and except as herein admitted or denied, denies each and every allegation in said paragraph III of the Application.

4. As to paragraph IV of the Application, admits that he is publisher of the *Nashville Banner*, a daily newspaper published in Nashville, Tennessee; that in times past he served as president of the American Newspaper Publishers Association and of the Southern Newspaper Publishers Association; that he served as vice-chairman of the Publishers National Radio Committee and as a member of the Radio Committee of the American Newspaper Publishers Association. Denies that said Radio Committee of the American Newspaper Publishers Association was delegated any authority whatsoever by that Association over matters relating to radio broadcasting, including the question of ownership of radio stations by newspapers; denies that said American Newspaper Publishers Association has any power or authority or has ever sought to exert any power or authority over newspapers or newspaper publishers in respect of the ownership of radio stations by newspapers or any other matter pertaining to radio broadcasting; and except as herein admitted or denied denies each and every allegation in said paragraph IV of the Application.

5. Denies each and every allegation in paragraph V. Denies that the Commission has any power or authority under the Act to conduct its investigation under Order No. 79 or to inquire into the matters specifically set forth in its Order No. 79-A or to issue any statement of policy or rules concerning the issue raised by Order No. 79 or the matters

specified in Order No. 79-A. Further, denies that any testimony respondent might give is relevant to the investigation under Orders Nos. 79 and 79-A, said orders being wholly illegal and beyond any power or authority conferred upon the Commission under the Act; shows that the investigation therefore is illegal in nature and in fact and that any facts and information in the possession of respondent concerning which he might testify are not relevant and essential to the carrying out of a lawful investigation; and except as herein admitted or denied denies each and every allegation in said paragraph V.

6. Admits he did not appear on August 1, 1941, as commanded in the paper purporting to be a subpoena. Denies such paper was a valid subpoena. Denies that his refusal to appear has impeded and continues to impede the progress of the hearing. Denies that the hearing is a lawful hearing, within the authority conferred by the Act. Further answering the allegations of said paragraph VI, respondent respectfully shows that when his name was called at the hearing on August 1, 1941, counsel to whom he had referred the paper dated July 29, 1941, annexed to the Application and marked Exhibit "D", informed the Commission respondent would not appear on the advice of counsel to the effect that the inquiry was an unlawful one, being made pursuant to an Order of the Commission which was without warrant or authority under the Act. Except as herein admitted or denied respondent denies each and every allegation in paragraph VI.

7. Further answering, respondent respectfully shows that for many years he has been a member of the American Newspaper Publishers Association, that after the announcement by the Commission of the opening date of the hearing, to wit July 23, 1941, the American Newspaper Publishers Association, by its attorney, in accordance with the rules and regulations for procedure issued by the Commission entered its appearance specially in the matter of the investigation ordered by said Order No. 79 and moved to vacate said Order No. 79 and Order No. 79-A and terminate the proceedings and further moved for oral argument on said motion and still further for a stay in the proceeding until

after argument and decision on said motion. A copy of counsel's appearance as entered is attached hereto marked Exhibit "B" and asked to be read as a part hereof. A copy of said motion is attached hereto marked Exhibit "C" and asked to be read as a part hereof. Respondent further shows that the Commission, without affording counsel an opportunity to be heard, in secret session held immediately before the opening of its hearing on July 23, 1941, denied said motion. Respondent further shows that when counsel for the American Newspaper Publishers Association asked the Commission for an opportunity to discuss his motion he was refused said opportunity by the Commission at the hearing.

Wherefore, respondent respectfully submits

(a) that the order to show cause hereinbefore issued in this proceeding be vacated; and

(b) that the application be dismissed.

JAMES G. STAHLMAN,
By ELISHA HANSON,
His Attorney.

CITY OF WASHINGTON,
District of Columbia, ss:

Elisha Hanson, being first duly sworn, upon his oath deposes and says that he is the attorney for James G. Stahlman, respondent herein; that the filing of the return to the order to show cause and the answer to the application was duly authorized by said respondent; that he has read the foregoing return and answer duly executed by him and knows the contents thereof to be true of his own knowledge, except for such matters as are alleged on information and belief, and as to them he is informed and believes the same to be true.

ELISHA HANSON.

Subscribed and Sworn To before me this 11th day of August, 1941.

[NOTARIAL SEAL.]

JERROLD B. ULLMAN,
Notary Public, D. C.

EXHIBIT "A".

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D. C.

June 28, 1941.

To the Station Addressed:

Order No. 79 (March 20, 1941) directed that an immediate investigation be undertaken by the Commission "to determine what statement of policy or rules, if any, should be issued concerning applications for high frequency broadcast stations (FM) with which are associated persons also associated with the publication of one or more newspapers and that public hearings with respect thereto be held at such times and such places as the Commission may direct, and that such investigation and public hearings shall also include consideration of statements of policy or rules, if any, which should be issued concerning future acquisition of standard broadcast stations by newspapers."

Prior to such public hearings the Commission is desirous of obtaining information concerning the present relations between standard broadcast station licensees and newspapers in their respective communities or service areas. The attached questionnaire is designed to elicit information on this subject from all licensees, whether or not they are associated with newspapers.

Since hearings are scheduled under Order 79 for July 23, 1941, you are requested to forward your return of this questionnaire at your earliest possible convenience, and, not later than Saturday, July 12, 1941.

Call Letters
Name of Licensee
Address

Question No. 1.

(General view of the newspaper picture in the community.)

Please list below all local and out-of-town newspapers which are customarily read by listeners in your primary service area for news of local community interest.

Name of Newspaper.	Place of Publication.	Daily.	Weekly.
.....			
.....			
.....			
.....			
.....			
.....			
.....			

Question No. 2.

(Publication of program logs in local newspapers.)

(a) Does any such newspaper carry your program listings without charge?
If so, state which ones:

(b) Does any such newspaper refuse to carry your program listings except on a paid basis?
If so, state which ones:

(c) If your program listings carried by any newspaper are not paid for, please state whether any trade deal exists between you and the newspaper with respect to the printing of such programs and explain fully.

(d) Does any newspaper listed under Question 1 above refuse to carry your program listings on any basis?
If so, state which ones:

(e) Does any of the answers given above under (a), (b), (c) and (d) represent a change from the situation existing prior to January 1, 1941? If so, specify which ones, giving the name of the newspaper concerned, the date and nature of the change and the reasons for it.

(3) Free space or free time in one medium for those purchasing advertising in the other. (This should include such services as bonus announcements or space discounts for advertisers.)

(4) What rates for space and for time are to be charged advertisers.

(5) Availability of newspaper's merchandising service to radio advertisers.

(6) Newspaper publicity concerning programs carried by the station.

(7) Any other agreements or understanding relating to advertising.

(b) If any such arrangements or agreements were reduced to writing, please attach copies hereto.

(c) If any such understandings or agreements were not reduced to writing, please give a summary statement of their terms and effect, setting forth their effective dates and the surrounding circumstances.

(d) If any such arrangements have been terminated, please state when they were terminated and set forth fully the circumstances and the reasons for the discontinuance.

(e) If you have not had any such cooperative arrangements with newspapers since July 1, 1936, please describe briefly all such propositions that were considered and all negotiations that took place, explaining the reasons for failure to conclude an agreement. State whether the original proposal came from the station or the newspaper and the advantages and disadvantages of such arrangements.

Question No. 4.

(Publicity and Promotional Activities.)

(a) Does any local newspaper carry display advertising concerning your station or its programs?

Which newspaper or newspapers:

(b) Do you pay for this advertising or not?

(c) Does any local newspaper refuse to carry display advertising for your station?

Which newspaper?

(d) Does any local newspaper have a regular radio editor, radio department, radio column or radio page?

Please state which papers have such regular features. Describe the treatment that is given to local programs.

(e) Are the activities of your station fairly and accurately handled in the newspaper radio features described above?

If not, give full details.

(f) Has any newspaper refused, as a matter of general policy, to give space to press releases or other news concerning your station?

Give full details.

(g) Do you have any arrangement with any newspaper whereby, in exchange for any of the above-mentioned types of publicity, you give free time or announcements to, or make mention of, the newspaper without charge in the programs of your station?

If so, please give details.

Question No. 5.

(News Broadcasts—News Services.)

(a) List below news services used by the station since July 1, 1933:

Name of press service.	Date service began.	Date service ended.
.....		
.....		
.....		
.....		
.....		

(b) If you have discontinued the use of any press service, please explain why.

(c) Are any of the above news services also used by any newspapers or other radio stations in your locality?
Please state the details.

(d) Do your contracts with press services contain any limitation upon the right of the station to use other news services or news sources or upon the right of the news service to supply news to other stations or newspapers in the community?
If so, state what press services and please submit copies of the relevant clauses of such contracts.

(e) Do your contracts with the news services contain any provisions which give the news service the right to select or limit the commercial sponsors of news broadcasts using such services?
If so, state what press services and please submit copies of the pertinent clauses of the contracts.

(f) Have you ever experienced difficulty in obtaining news from a press service which was already serving newspapers or other radio stations in the community?
If so, please explain the situation.

Question No. 6.

(News Broadcasts—Local News.)

- (a) Do you broadcast any local or regional news?
- (b) If so, is it obtained from any wire service?
- (c) Does the station rely on newspapers for such news?

If so, please explain the arrangements.

(d) Do you have any other sources of such news? What are they?

(e) Does your station have any staff or facilities of its own used for the gathering and reporting of local news?

If so please describe them.

(f) Are any sources of local news in the community used jointly by the station and any newspaper?

If so, please give details.

Question No. 7.

(News Broadcasts—Editing and Sponsorship.)

(a) If you subscribe to a news service or obtain news from a newspaper, do you use all the regular news as it comes in from that source?

(b) If not, explain who does the actual editing and selection of news.

(c) Does any newspaper sponsor any regular news broadcast over your station? If so, does the newspaper pay for such sponsorship, or is it a courtesy arrangement?

(d) If you carry sponsored news broadcasts, do your agreements with the sponsors give such sponsors the exclusive privilege of sponsoring news broadcasts of any particular type over your station?

Please explain fully.

(e) Do sponsors participate in any way in the preparation of script for news broadcasts?
Please explain fully.

Question No. 8.

(Joint personnel.)

Please list below any person who regularly performs or participates in programs broadcast by the station, or who arranges, writes or creates program material, and who is in any way connected with a newspaper.

Name.	Relation to the station.	Services performed for the station.	Newspaper with which associated.	Place of publication.	Nature of connection with newspaper.
.....					
.....					
.....					
.....					
.....					
.....					
.....					
.....					

Question No. 9.

(Business Connections.)

(a) Does the station submit its books, records, or accounting procedure in any way for the inspection or supervision of any person who is also an officer or employee of a newspaper?
If so, please give details.

(b) Is authorization by any such person necessary for the payment or disbursement of any funds of the licensee?
If so, please give details.

(c) Does any such person exercise any control over the receipts, bank accounts, or funds of the licensee?
If so, please give details.

(d) Is the signature of any such person required with respect to any withdrawals on any bank accounts of the licensee?

If so, please give details.

Question No. 10.

(Consultation on Matters of Policy or Management.)

Please check whether problems associated with any of the matters indicated below are submitted to any person who is an officer or employee of a newspaper for information or approval:

	Yes	No
Granting of free time by the station for the discussion of public issues	...	...
Advertising	...	...
News broadcasts	...	...
Other programs	...	...
Station personnel	...	...

With reference to the items checked, please describe the relation fully, stating the name of the paper and the position of the officer or employee consulted.

EXHIBIT "B".

Law Offices of
HANSON, LOVETT & DALE
729 Fifteenth Street
Washington, D. C.

July 14, 1941.

In re Order No. 79 (Docket No. 6051)

The Federal Communications Commission,
Washington, D. C.

SIRS:

By direction of the Board of Directors of the American Newspaper Publishers Association, I hereby enter my ap-

pearance specially in the proceeding instituted by your body under its Order No. 79, dated March 20, 1941, for the purpose of moving and presenting legal considerations in support of said motion to have the Commission vacate Order No. 79 and Order No. 79-A and terminate the proceeding.

My motion to this end is being filed as of this date.

I respectfully request that it be calendared for argument at the Commission's earliest convenience and further that it be acted upon prior to the taking of testimony or the receipt of any documentary evidence.

The American Newspaper Publishers Association is a membership corporation organized and existing under the laws of the State of New York. Membership in the Association is confined to publishers of daily and/or Sunday newspapers. This membership embraces more than 425 newspaper publishers whose publications represent in excess of 80% of the total daily and Sunday circulation of newspapers published in the United States. Many of the members of the Association now hold radio broadcast licenses. Some of them hold high frequency broadcast licenses; others are applicants for licenses.

While it is true that many newspaper publishers do not hold any radio broadcast licenses and are not applicants for licenses all are vitally interested in the question precipitated by the Commission in its Order No. 79.

The purpose of the hearing as announced by the Commission in its Order No. 79 and in its further Order No. 79-A, dated July 1, 1941, and as evidenced by the questionnaire sent out by the Commission under date of June 28, 1941, presents an issue that is vital to all newspaper publishers, whether or not they are licensees in the radio broadcast field or applicants for licenses.

It is the contention of the American Newspaper Publishers Association that the Federal Communications Commission is without power under the Constitution of the United States to lay down a policy, the purpose of which is to bar persons, firms or corporations engaged in the newspaper publishing business from engaging in the radio broadcast business.

Further it is the contention of this Association that, by reason of the precise terms of the Act under which the Commission functions, the Commission is prohibited from laying down such a policy.

This Association is prepared to support its contentions and to that end has directed this notice of special appearance for that purpose.

Respectfully,

ELISHA HANSON,
General Counsel,
American Newspaper Publishers Association.

EXHIBIT "C".

FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C.

In re Order No. 79

Docket No. 6051

**Motion to Vacate Order No. 79 and Order No. 79-A and
Terminate Proceeding.**

Comes now the American Newspaper Publishers Association, by Elisha Hanson, its General Counsel, and moves that the Commission vacate its Orders No. 79 and No. 79-A and terminate the proceeding instituted thereunder.

In support of said motion, said Association respectfully points out:

1. The Commission is without authority under the statute governing its operations to conduct such an inquiry as it has embarked on pursuant to Order No. 79, or to take testimony or other evidence in connection therewith as provided for in its Order No. 79-A.

2. The Commission is without authority under the statute governing its operations to enter any order or adopt any policy or rules for its guidance in the consideration of applications now pending, applications that may be filed in

the future, or renewal applications the purpose and effect of which would be to extend the limitation on the holding and transfer of licenses as that limitation is set forth in Sec. 310 (a) and (b) of the Communications Act of 1934, As Amended.

3. The Commission is without authority under the statute governing its operations to enter any order or adopt any policy or rules for its guidance in consideration of matters arising under Sec. 311 of the Communications Act of 1934, As Amended, the purpose and effect of which would be to extend the provisions of that Section to persons other than those specifically referred to therein.

4. The Commission is without authority through statements of policy, the adoption of such policy or policies, or through the adoption of rules and regulations to legislate on the question of who shall or shall not be entitled to receive approval of applications for radio broadcast licenses, of whatever kind or description, or approval of applications for renewal or transfer of such licenses.

5. The Commission is without authority to adopt either a policy or rules providing for the classification of persons, citizens of the United States, for the purpose of disqualifying any persons belonging to a particular class because of their belonging to that class from holding radio broadcast licenses or receiving approval of their applications for such licenses or receiving approval of applications for the transfer of such licenses from others to them.

6. The Commission, being without authority to adopt a policy or rules concerning the matters specified in its Order No. 79, as elaborated in its Order No. 79-A, it is without authority to conduct any inquiry into the subject to determine what statement of policy or rules, if any, should be issued concerning applications for high frequency broadcast stations (FM) with which are associated persons also associated with the publication of one or more newspapers or to determine what statement of policy or rules, if any, should be issued concerning future acquisition of standard broadcast stations by newspapers.

7. The Commission is without authority to conduct a general inquiry into the newspaper publishing business pursuant to its Order No. 79, as elaborated in its Order No. 79-A, and as propelled in its questionnaire dated June 28, 1941, sent out to stations licensed by the Commission.

It Is Further Moved that this motion be calendared for argument at the Commission's earliest convenience, argument heard thereon and consideration be given to a brief to be filed in support thereof and,

It Is Still Further Moved that the proceeding instituted by Order No. 79 be stayed until the Commission shall have considered and passed upon the points raised in this motion and,

It Is Still Further Moved that the motion be granted, that Orders No. 79 and 79-A be vacated and the proceeding instituted thereunder terminated.

Respectfully submitted,

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,

By (Sgd.) ELISHA HANSON,

General Counsel.

District of Columbia, ss:

Elisha Hanson, being duly sworn, upon his oath deposes and states that he is the General Counsel of the American Newspaper Publishers Association; that pursuant to instructions he has entered his appearance specially in the proceeding instituted by the Federal Communications Commission pursuant to Orders No. 79 and 79-A for the purpose of moving as set out in the foregoing motion to vacate those orders and terminate the proceeding.

(Sgd.) ELISHA HANSON.

Subscribed and Sworn to before me, a notary public in and for the District of Columbia, this 14th day of July, 1941.

[SEAL]

(Sgd.) ELIOT C. LOVETT.

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C.

Docket No. 6051.

In re Orders No. 79 and 79-A.

Decision and Order on Motion to Vacate Order.

This is a petition by American Newspaper Publishers Association to vacate Commission Order No. 79 and Order No. 79-A and to terminate the proceedings instituted thereunder.

Order No. 79, issued on March 20, 1941, directed that an investigation be undertaken to determine what statement of policy or rules, of any, should be made concerning applications for high-frequency broadcast stations (FM) by persons also associated with the publication of one or more newspapers, and concerning the future acquisition of standard broadcast stations by such persons. This order was supplemented by Order No. 79-A, issued July 1, 1941, setting forth the issues on which testimony would be taken. The hearing was originally scheduled for June 25, 1941, but was continued to July 23, 1941, on the petition of a committee representing certain newspaper publishers.

The instant petition, filed July 15, 1941—eight days before the date set for the hearing—requests the Commission to vacate its Orders No. 79 and 79-A on the ground that the Commission lacks authority to conduct proceedings of the type contemplated by the Order.

Our jurisdiction to issue Order No. 79 and Order No. 79-A was carefully considered prior to the promulgation of those orders. It seems inconceivable to us that an argument could be seriously advanced against the inherent power of any administrative agency, endowed by statute with power to hold hearings, issue subpoenas, etc., to conduct general hearings of the type involved here. One of the principal reasons for the establishment of administrative agencies is the expertness which such agencies are expected to develop in the administration of difficult and complicated matters. If problems involved in the regulation of an agency are complex enough to induce Congress to establish an administrative

agency to administer them, it would seem unlikely that Congress would limit its usefulness by denying to it the power to hold general hearings for the purpose of acquainting itself with the problems of the industry and the best solution therefor. Such an intention is not to be imputed to Congress unless the statute creating the agency explicitly so provides.

But our jurisdiction does not rest alone on this inherent power of administrative agencies. The Communications Act explicitly confers on us the power to conduct such proceedings as that involved in Orders 79 and 79-A.

Section 403 of the Act provides:

“The Commission shall have *full* authority and power at any time to institute an inquiry, on its own motion, *in any case and as to any matter* or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or *concerning which any question may arise under any of the provisions of this Act*, or relating to the enforcement of any of the provisions of this Act.” (Italics supplied.)

In the administration of Section 309 of the Act, authorizing the Commission to grant or deny applications for station licenses, the question whether the public interest, convenience, and necessity is served by the granting of a license to newspaper interests has arisen from time to time. (*e. g.* *Port Huron Broadcasting Co.*, 5 F. C. C. 177; *Dorance D. Roderick*, 3 F. C. C. 616, 5 F. C. C. 563; *The South Bend Tribune*, 6 F. C. C. 783; *Barnes & Weiland et al.*, — F. C. C. — (Decided April 15, 1940).

With the recent advent of frequency modulation (FM) broadcasting, this question has taken on an increased importance. Out of 116 applications for FM licenses 45, filed by newspaper interests, confront the Commission with the necessity of determining whether or not the granting of FM licenses to such interests will serve the public interest, convenience or necessity. The Commission's duty to act upon these applications for licenses carries with it the duty to determine the qualifications of the applicants. Under Section 309 each of these applications would have to be

set for hearing if the Commission could not determine from the examination thereof that public interest, convenience or necessity would be served by a grant. To deny the Commission the power to institute a general inquiry into the same matter under Section 403, as urged by petitioner, would deprive Section 403 of all meaning, and would lead to the unreasonable result that we are empowered to hold scores of particular hearings in order to arrive at a determination of policy but are not empowered to hold one general inquiry for the same purpose. The power conferred by Section 403, and the further power conferred by Section 4(j) to conduct proceedings "in such manner as will best conduce to the proper dispatch of business and to the ends of justice" were hardly intended to impose such a procedural strait-jacket on the Commission.

The Commission's authority under Section 403 to institute the proceedings covered by Orders 79 and 79-A is not, moreover, limited to matters arising under Section 309. An inquiry may be authorized as to "any matter" concerning which "any question" may arise under "any of the provisions of this Act." Thus the issues to be examined pursuant to Order No. 79 may be broad enough to include subjects concerning which the Commission may wish to consider recommending additional legislation in its annual report to Congress, as directed by Section 4(k) of the Act. Even if the questions arising under Order No. 79 and 79-A were not clearly matters arising under Section 309, the Commission could conduct such a general inquiry preliminary to determining whether to make recommendations to Congress for additional legislation.

The instant petition appears to be less concerned with Order No. 79 and Order No. 79-A than with some possible regulations, the precise nature of which petitioner does not state, which it fears the Commission may promulgate at some future date. It would certainly not be conducive to the proper dispatch of business to permit petitioner at this time to argue the validity of purely suppositious regulations which may or may not be promulgated after the hearings are closed. If at the close of the hearings we do determine that the public interest makes regulations necessary or ad-

visible, our procedure allows ample opportunity to argue the validity or invalidity of such regulations at that time.

It Is Ordered, this 23rd day of July, 1941, that the petition filed by American Newspaper Publishers Association to vacate Commission Order No. 79 and 79-A Be, And It Is, Hereby Denied.

FEDERAL COMMUNICATIONS COMMISSION,
WM. P. MASSING,
Acting Secretary.

Memorandum.

Filed August 14, 1941.

MORRIS, J.:

The Federal Communications Commission issued a subpoena to the respondent, directing him to appear before the Commission at a time and place stated, and to testify concerning matters being investigated by the Commission under orders issued by it designated as numbers 79 and 79-A. These orders direct an investigation to determine what statement of policy or rules, if any, should be issued concerning applications for broadcast stations with which are associated persons also associated with the publication of one or more newspapers. (Order 79-A, supplementing the original order, states certain questions more specifically with respect to the advantages and disadvantages of such joint association.) The respondent is a newspaper publisher who has been the president of prominent newspaper publishers' associations and a member of the Radio Committee of the American Newspaper Publishers' Association. He is, therefore, considered eminently qualified to furnish information which would be helpful to the Commission in its investigation. The respondent declined to appear responsive to the subpoena. He was directed to show cause in these proceedings why he should not be required to comply with the subpoena. In his answer, he challenges the authority of the Commission to conduct the investigation in question and, therefore, the power of the Commission to issue the subpoena in question. It is asserted that

the only purpose of the investigation would be to bar persons, firms or corporations engaged in the newspaper publishing business from engaging in the radio broadcasting business, and that this would be an unlawful enlargement by the Commission of the limitations contained in the Communications Act of 1934, as amended. It is insisted that such general investigation transcends the powers of the Commission over licenses for broadcasting stations as defined by the Supreme Court in *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U. S. 470, and offends the principle announced by the Supreme Court in the case of *Harriman v. Interstate Commerce Commission*, 211 U. S. 407.

Section 403 of the Communications Act provides in part as follows:

“Sec. 403. The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or *concerning which any question may arise under any of the provisions of this Act*, or relating to the enforcement of any of the provisions of this Act.” [Italics supplied.]

Section 309(a) of the Act provides:

“Sec. 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.”

It was stated by the Supreme Court, in the *Sanders Brothers case, supra*, that the Act recognizes that broad-

casters are not common carriers; that the field of broadcasting is one of free competition; that the Act does not essay to regulate the business of the licensee; and that the field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel. It is also expressly stated, however, in that case:

“An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts.”

It is hardly to be questioned that, in the case of any particular application, especially if there are competing applications, consideration may properly be given to the advantageous situation which one applicant may have by reason of his ability to more easily and accurately gather news and broadcast the same by reason of association with news gathering agencies of the press. If that be so, and it is not questioned by the respondent here, it is difficult to understand why the Commission cannot by the instant investigation undertake to fully and accurately inform itself concerning all of the advantages and disadvantages, if any, of such joint association, and thus be equipped to more intelligently determine the question of public interest and convenience presented when such factors are present. The Act authorizes the Commission to make recommendations for proposed legislation germane to the field which the Act gives it the power to regulate. Certainly such recommendations should not be made without diligently undertaking to secure relevant data and the informed thought of those likely to be affected. The surest safeguard against uninformed and arbitrary action is to be found in securing information from those best qualified to know the results of any governmental action. Certainly, until such action, if any, be taken, its constitutionality cannot be weighed and determined by a court, and, indeed, no presumption is to be indulged in that any action will be taken that is unconstitutional; nor is it to be presumed that the respondent will

be required to give testimony of an irrelevant or privileged nature. The inquiry should be conducted fairly and reasonably, and it must be presumed that it will be. The authority of the Commission under the Act here involved is broader than the provisions which were challenged in the *Harriman case, supra*, and so I do not believe that the question here is controlled by that case.

An order will be entered requiring the respondent to appear before the Federal Communications Commission, or an officer properly designated by it, to testify concerning the matters being investigated under Orders No. 79 and 79-A.

(Sgd.) JAS. W. MORRIS,
Justice.

August 14, 1941.

Order.

This cause, having come on for hearing on August 11, 1941, upon the application of the Federal Communications Commission for an order to show cause and for an order requiring the appearance of the respondent, James G. Stahlman, pursuant to a subpoena dated July 29, 1941; an order to show cause having been issued on August 2, 1941 and the respondent having filed a return to said order and an answer to said application; the cause having been argued by counsel for both parties, and briefs having been submitted, and the Court being fully advised:

It is hereby ordered that the respondent, James G. Stahlman, appear before the Federal Communications Commission, or an officer properly designated by it, on September 17, 1941, at Hearing Room A, Interstate Commerce Commission Building, or on such later date or at such different place as the Commission may upon notice designate, to testify concerning the matters being investigated under Federal Communications Commission Order No. 79.

JAS. W. MORRIS,
District Judge.

Dated: August 15, 1941.

Approved as to form only.

ELISHA HANSON,
Counsel for Respondent.

Notice of Appeal.

Filed Aug. 22, 1941.

Notice is hereby given that James G. Stahlman, respondent above named, hereby appeals to the United States Court of Appeals for the District of Columbia from the final judgment, designated an "Order", entered in this action on August 15, 1941.

(Sgd.) ELISHA HANSON,
729 15th Street, N. W.,
Washington, D. C.,
Attorney for Respondent,
James G. Stahlman.

**Statement of Points to be Relied Upon on Appeal by
Appellant, James G. Stahlman.**

Filed Aug. 25, 1941.

1. The court erred in ordering appellant to appear before the Federal Communications Commission, or an officer properly designated by it, to testify concerning the matters being investigated under the Commission's Order No. 79.

2. The court erred in failing to find that Order No. 79 is invalid and without force of law since the Communications Act of 1934, as amended, (hereinafter called "the Act") confers no power upon the Commission to issue said Order and to conduct the inquiry in which it is engaged for each and all of the following reasons:

(a) The Commission has gone beyond the express or implied powers which Congress included in the Act, by ordering in Order No. 79 an investigation to determine what statement of policy or rules, if any, should be issued concerning applications for high frequency broadcast stations with which are associated persons also associated with the publication of one or more newspapers and also concerning future acquisition of standard broadcasting stations by newspapers.

(b) The sole standard which the Commission can lawfully apply in considering an application for the granting or for the renewal or modification of a station license is that of "public convenience, interest, or necessity" by which Congress specifically limited the discretion of the Commission in Section 307 (a) and Section 309 of the Act.

(c) The only limitations upon the holding and transfer of licenses which the Commission can lawfully enforce are those expressly enumerated by Congress in Sections 310 and 311 of the Act.

(d) Order No. 79 and supplementary Order No. 79-A disclose on their face that the Commission is exceeding its powers by considering the adoption by it of a policy or rules which might result in legislating standards additional to the sole standard expressly declared by Congress in Section 307 (a) of the Act and in legislating limitations in addition to those expressly enumerated by Congress in Sections 310 and 311 of the Act.

(e) Order 79 exceeds the powers of the Commission by purporting to consider the adoption of a public policy in substitution of that clearly expressed by Congress in the Act and in the limitations contained therein.

(f) Order No. 79 goes beyond any lawful authority of the Commission, since it purports to consider the adoption by it of a policy or rules which might be tantamount to legislation on the question of whether persons engaged in the newspaper publishing business merely by reason of that fact and only that fact are either disqualified from or qualified for receiving approval of applications for station licenses or approval of applications for the renewal or modification or for the transfer of such licenses.

(g) Lacking the power to consider the adoption by it of a policy or rules of the nature hereinabove described, the Commission has no power to conduct the inquiry to that end as ordered in Order No. 79.

3. The court erred in failing to hold that the present proceeding is governed by the decision of the Supreme Court of the United States in *Federal Communications Com-*

mission v. Sanders Brothers Radio Station, 309 U. S. 470 (1940) (see also concurring opinion of Edgerton, J., in *Colorado Radio Corporation v. Federal Communications Commission*, 118 F. (2d) 24, 28 (App. D. C. 1941), for each and all of the following reasons:

(a) Under the *Sanders* decision the only considerations by which the Commission can be governed in applying the standard of "public convenience, interest, or necessity" to the facts of a particular application are (1) an available frequency over which the applicant can broadcast without interference to others, (2) the applicant's financial ability to make good use of the assigned channel, (3) the adequacy of the applicant's equipment and (4) his ability to render the best practicable service to the community reached by his broadcasts.

(b) Order No. 79 flies in the face of the *Sanders* decision by asserting power in the Commission to consider the adoption by it of a policy or rules which might result in adding to the exclusive considerations enumerated in the *Sanders* decision the consideration that the applicant is a newspaper or a person associated with a newspaper.

4. The court erred in interpreting the *Sanders* decision in that it failed to distinguish between (a) the ownership of or association with a newspaper as *one circumstance* relevant to the factors enumerated in the *Sanders* opinion which the Commission can properly weigh in passing upon a *particular application* and (b) the ownership of or association with a newspaper as *the sole fact* upon which the Commission purports by Order No. 79 to consider the adoption by it of a policy or rules governing a group of applications contrary to the policy expressed in the Act as interpreted by the Supreme Court.

5. The court erred in failing to find that by statute and by judicial decision the Commission is under a duty to consider "public convenience, interest, or necessity" in connection with an application of a particular applicant.

6. The court erred in failing to find that the Commission has no power to group together for consideration a number

of applications for licenses in widely separated localities merely by reason of the common fact that the applicants are publishers of newspapers or persons associated with newspapers.

7. The court erred in failing to find that the Commission is without authority to conduct a general inquiry into the relations of the newspaper publishing business and the radio industry pursuant to Order No. 79 as elaborated in Supplementary Order No. 79-A, and further elaborated in its questionnaire dated June 28, 1941, sent out to stations licensed by the Commission for each and all of the following reasons:

(a) The matters contained in Order No. 79-A and the questionnaire show on their face that the Commission is asserting power to command for its information nothing more or less than a bill of particulars in respect of the newspaper publishing business.

(b) The Commission has no power under the act to conduct a general inquiry into the newspaper publishing business.

(c) Even if the information sought by Order No. 79, as supplemented by Order No. 79-A and the questionnaire, is alleged to be for use in connection with the administration of the broadcast provisions of the Act, the *Sanders* decision conclusively establishes that the Commission has no power to exercise supervisory control over the programs, the business management or the policies of radio stations as covered by the subject matter of the foregoing Orders and questionnaire.

8. For the reasons set forth under points 2 to 7 the court erred in failing to hold that no jurisdiction is conferred upon the Commission over the affairs of respondent by reason of anything contained in Order No. 79.

9. For the reasons set forth under points 2 to 7 the court erred in failing to find that Order No. 79 and the purported subpoena issued and served upon the respondent pursuant thereto violate the liberty of respondent as guaranteed by the Fifth Amendment to the Constitution of the United States.

10. The court erred in failing to find that while the respondent, in the words of the court, is "considered eminently qualified to furnish information which would be helpful to the Commission in its investigation", the Commission has no jurisdiction over respondent by reason of anything contained in Order No. 79 for the reasons set forth under points 2 to 7.

11. The court erred in failing to find that the Commission has no power to consider the adoption by it for its own guidance of a policy or rules which might result in a discriminatory administration of the Act as shown on the face of Order No. 79 for each and all of the following reasons:

(a) There is no statutory authority empowering the Commission to make a general classification of persons, otherwise qualified under the Act, for the purpose of disqualifying persons belonging to a particular class from holding licenses or to limit the number of persons within that class who may be eligible to hold licenses. See *Tri-State Broadcasting Corporation v. Federal Communications Commission*, 96 F. (2d) 564 (App. D. C. 1938).

(b) There is no statutory authority empowering the Commission to make a general classification of persons, otherwise qualified under the Act, for the purpose of granting preferential treatment to persons belonging to a particular class in respect of the approval or holding of licenses or to increase the number of persons within that class who may be eligible to hold licenses.

(c) A general classification such as is described under (a) and (b) herein would be in direct conflict with the limitations imposed upon the Commission's powers over licenses as judicially defined by the Supreme Court of the United States in *Federal Communications Commission v. Sanders Brothers Radio Station*, supra, and as specified in Sections 310 and 311 of the Act.

(d) A general classification of the sort described under (a) herein would constitute an injurious discrimination against newspaper publishers or against persons associated with newspapers in violation of the Fifth Amendment to

the Constitution of the United States and in violation of respondent's rights as a publisher of a newspaper. Cf. *Curriu v. Wallace*, 306 U. S. 1 (1939); *Grosjean v. American Press Co.*, 297 U. S. 233 (1936).

(e) A general classification of the sort described under (b) herein would constitute an injurious discrimination to all other applicants in violation of the Fifth Amendment to the Constitution of the United States. Cf. *Curriu v. Wallace*, 306 U. S. 1 (1939).

12. The court erred in failing to find that Order No. 79 does not purport to order the investigation in controversy for the purpose of making recommendations to Congress for each and all of the following reasons:

(a) Order 79 on its face proclaims no purpose other than that of obtaining information *for the guidance* of the Commission in considering the adoption *by the Commission* of a policy or rules in respect of applications for licenses by newspapers or persons associated with newspapers.

(b) The purpose of Order No. 79 as described in (a) herein was subsequently affirmed in the questionnaire of June 28, 1941 and reaffirmed in supplemental Order No. 79-A.

(c) The sole question in this proceeding is the power of the Commission to conduct the inquiry instituted by Order No. 79 as disclosed by the terms of that Order.

(d) The purported subpoena in this proceeding was alleged to have been issued and served upon respondent pursuant to Order No. 79.

(e) The application of the Commission was solely for an order requiring respondent to appear and testify concerning matters being investigated under Orders No. 79 and 79-A.

13. The court erred in failing to find that even if the issue of the power of the Commission to make a general fact-finding inquiry is deemed to be embraced within Order No. 79, the investigation is nevertheless beyond the author-

ity of the Commission for each and all of the following reasons:

(a) Section 4 (k) of the Act simply requires the Commission to make annual reports to Congress which might include recommendations for additional legislation as a possible incidental result of the day-to-day activities of the Commission but the aforesaid section does not authorize a general inquiry such as that initiated by Order No. 79.

(b) Order No. 79 does not institute an inquiry "concerning which any question may arise under any of the provisions of this Act" as provided in Section 403 of the Act since the subject matter of the purported investigation is beyond any lawful power of the Commission as decided in *Federal Communications Commission v. Sanders Brothers Radio Station, supra*, and *Tri-State Broadcasting Corporation v. Federal Communications Commission, supra*.

(c) Order No. 79 does not relate "to the enforcement of any of the provisions of this Act" within the meaning of Section 403 of the Act since the Commission is precluded by the precise terms of the Act from considering the adoption by it of a policy or rules which might result in legislating standards or limitations in addition to those expressly enumerated in the Act as judicially construed in the *Sanders* and *Tri-State Broadcasting* cases, *supra*.

(d) Order No. 79 does not fall within the terms of Section 403 by reason of being an inquiry "as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act" for the reasons set forth under (b) and (c) herein and for the additional reason that Order No. 79 was not issued as a result of any complaint of violation of the Act or in connection with a specific application for a license or its renewal, modification or transfer.

14. For the reasons set forth in points 12 and 13 the court erred in holding that this proceeding fell within the principle stated in the court's opinion that "The Act authorizes the Commission to make recommendations for proposed legislation germane to the field which the Act gives it the

power to regulate," when in fact Order No. 79 is beyond any power conferred upon the Commission by the Act.

15. For the reasons set forth in points 12 and 13 the court erred in supposing that the question herein was simply one of securing "relevant data and the informed thought of those likely to be affected" and "from those best qualified to know the results of governmental action", when in fact the Commission has no power under the Act to secure the said information.

16. For the reasons set forth in points 2 to 13 inclusive the court erred in holding that before action, if any, is taken by the Commission, "its constitutionality cannot be weighed and determined by a court, and, indeed, no presumption is to be indulged in that any action that will be taken is unconstitutional"; that it is not to be presumed that "the respondent will be required to give testimony of an irrelevant or privileged nature" and that presumably the inquiry will be conducted fairly and reasonably, when in fact Order No. 79 shows on its face that the Commission has no authority to conduct the investigation.

17. The court erred in failing to hold that if Order No. 79 is deemed to institute an inquiry into any subject pertaining to the relations of the newspaper publishing business and the radio industry, the investigation is beyond the power of the Commission as an illegal "fishing expedition" of the same nature as the ones condemned in the controlling cases of *Harriman v. Interstate Commerce Commission*, 211 U. S. 407 (1908), and *Federal Trade Commission v. American Tobacco Company*, 264 U. S. 298 (1924).

18. The court below erred in stating that the question in the present proceeding is not controlled by the *Harriman* case, *supra*, since the principles of the *Harriman* case were not limited by the subsequent decision of the Supreme Court of the United States in *Smith v. Interstate Commerce Commission*, 245 U. S. 33 (1917), despite the broadening of the investigatory powers of the Interstate Commerce Commission by an amendment similar to the provisions of Section 403 of the Act herein, and the doctrine of the *Harriman*

case was reaffirmed in 1924 in the *American Tobacco Company* case.

19. The court erred in failing to hold that irrespective of what view might be taken of the *Harriman* and *Smith* cases the investigatory powers of the Commission herein are more limited as applied to the field of broadcasting in view of the decision in *Federal Communications Commission v. Sanders Brothers Radio Station*, *supra*, that broadcasters are not common carriers and are not to be dealt with as such, and that Congress has not abandoned free competition in the field of broadcasting as it has done in the case of common carriers.

20. The court erred in failing to vacate the order to show cause issued in this proceeding.

21. The court erred in granting the application of the Commission for an order requiring the appearance of respondent pursuant to the purported subpoena herein.

Respectfully submitted,

(Sgd.) ELISHA HANSON,
729 15th St., N. W.,
Washington, D. C.,
Attorney for Appellant, James G. Stahlman.

Respondent's Designation of Contents of Record on Appeal.

Filed Aug. 25, 1941.

Comes now James G. Stahlman, respondent in the above entitled proceeding, and for the purpose of an appeal files this his designation of contents of record on appeal and requests the clerk of the District Court of the United States for the District of Columbia to certify to the United States Court of Appeals for the District of Columbia as the record in this matter the following:

1. Applicant's application for an order requiring appearance pursuant to subpoena, together with all Exhibits "A" to "D" attached thereto.

2. Order to show cause entered by the court on August 2, 1941.

3. Respondent's return to order to show cause and answer to application, together with all Exhibits "A" to "C" attached thereto.

4. Decision and order on motion to vacate Orders No. 79 and 79-A in Docket No. 6051 entered by the Federal Communications Commission on July 23, 1941.

5. Memorandum opinion by Judge Morris, August 14, 1941.

6. Order entered by the court August 15, 1941.

7. Notice of appeal with date of filing.

8. Respondent-appellant's designation of contents of record on appeal.

9. Respondent-appellant's statement of points to be relied upon on appeal.

10. Applicant-appellee's designation of record on appeal (if filed).

Respectfully submitted,

(Sgd.) ELISHA HANSON,
729 15th Street, N. W.,
Washington, D. C.,

Attorney for Respondent, James G. Stahlman.

Constitutional Provision Involved.

Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutory Provisions Involved.

The pertinent provisions of the Communications Act of 1934 (48 Stat. 1096; 47 U. S. C., Sec. 151 *et seq.*) are as follows:

SEC. 3 (h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not insofar as such person is so engaged, be deemed a common carrier.

SEC. 4 (k) The Commission shall make an annual report to Congress, copies of which shall be distributed as are other reports transmitted to Congress. Such report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of interstate and foreign wire and radio communication and radio transmission of energy, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary: *Provided*, That the Commission shall make a special report not later than February 1, 1935, recommending such amendments to this Act as it deems desirable in the public interest: *Provided further*, That each year,

at the beginning of the session of the Congress, the Commission shall report to the Congress whether or not any new wire or radio communication legislation is required better to insure safety of life and property. If any such new legislation is considered necessary the Commission shall make specific recommendations thereof to the Congress.

SEC. 307 (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

SEC. 308 (a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it.

(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership

and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

SEC. 309 (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

SEC. 310 (a) The station license required hereby shall not be granted to or held by—

- (1) Any alien or the representative of any alien;
- (2) Any foreign government or the representative thereof;
- (3) Any corporation organized under the laws of any foreign government;
- (4) Any corporation of which any officer or director is an alien or of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country;

(5) Any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens, or of which more than one-fourth of the capital stock is owned of record or voted, after June 1, 1935, by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or the revocation of such license.

SEC. 311. The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313, and is hereby authorized to refuse such station license and/or permit to any other person (or to any person directly or indirectly controlled by such person) which has been finally adjudged guilty by a Federal court of unlawfully monopolizing, or attempting unlawfully to monopolize, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means, or to have been using unfair methods of competition. The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person for violating the law against unfair methods of competition or for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade, or from instituting proceedings for the dissolution of such corporation.

SEC. 312 (a) Any station license may be revoked for false statements either in the application or in the statement of fact which may be required by section 308 hereof, or because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application, or for failure to operate substantially as set forth in the license, or for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act or by a treaty ratified by the United States.

(b) Any station license hereafter granted under the provisions of this Act or the construction permit required hereby and hereafter issued, may be modified by the Commission either for a limited time or for the duration of the term thereof, if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States will be more fully complied with.

SEC. 319 (a) No license shall be issued under the authority of this Act for the operation of any station the construction of which is begun or is continued after this Act takes effect, unless a permit for its construction has been granted by the Commission upon written application therefor. The Commission may grant such permit if public convenience, interest, or necessity will be served by the construction of the station. This application shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and the financial, technical, and other ability of the applicant to construct and operate the station, the ownership and location of the proposed station and of the station or stations with which it is proposed to communicate, the frequencies desired to be used, the hours of the day or other periods of time during which it is proposed to operate the station, the purpose for which the station is to be used, the type of transmitting apparatus to be used, the power to be used, the date upon which the station is expected to be completed and in operation, and such other information as the Commission may require. Such application shall be signed by the applicant under oath or affirmation.

SEC. 403 The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by com-

plaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

SEC. 409 (a) Any member or examiner of the Commission, or the director of any division, when duly designated by the Commission for such purpose, may hold hearings, sign and issue subpoenas, administer oaths, examine witnesses, and receive evidence at any place in the United States designated by the Commission.

(b) For the purposes of this Act the Commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of all books, papers, schedules of charges, contracts, agreements, and documents relating to any matter under investigation. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(c) Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

(d) Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier or licensee or other person, issue an order requiring such common carrier, licensee, or other person to appear before the Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

10/1/1941
J. G. Stahlman
Clerk

No. 8039

**In the United States Court of Appeals for the
District of Columbia**

JAMES G. STAHLMAN, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

BRIEF OF APPELLEE

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In the United States Court of Appeals for the District of Columbia

No. 8039

JAMES G. STAHLMAN, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

BRIEF FOR APPELLEE, FEDERAL COMMUNICATIONS COMMISSION

SUMMARY OF ARGUMENT

Appellant's sole reason for refusing to obey the subpoena is the contention that the Commission is without power to conduct the investigation directed by Order No. 79. Section 403 authorizes the Commission to conduct an inquiry on its own motion as to any matter concerning which any question may arise under any of the provisions of the Communications Act. The present inquiry is authorized by Section 403 as an inquiry concerning questions which may arise under Section 309 (a) and Section 4 (k) of the Act.

I

Section 309 (a) requires the Commission, in connection with applications for station licenses or for renewals or modifications of station licenses, to examine into the "public interest, convenience, or necessity." The significance of newspaper ownership in this connection involves questions which have repeatedly been presented to the Commission under Section 309 and which were before the Commission in connection with some forty-five frequency modulation (FM) applications as of the date when hearings began on Order No. 79. Appellant does

not deny the Commission's authority to inquire into newspaper-radio relationship as an element in the "public interest, convenience, or necessity."

The Commission has the power under Section 403 of the Communications Act to investigate in a single inquiry, rather than in successive hearings on individual applications, the effect of newspaper-radio relationship upon the "public interest, convenience, or necessity." Such a general inquiry is in accord with good administrative practice, and is required by the broad responsibilities entrusted to the Commission. Section 4 (j) empowers the Commission to conduct its proceedings with "proper dispatch." Since Section 309 contains separate provisions for the holding of hearings on individual applications, it is clear that Section 403 contemplates general hearings of the type now being held by the Commission.

The inquiry of the Commission is not being held for the purpose of arriving at any policy unrelated to the statutory standard of "public interest, convenience, or necessity." It is expressly directed by Order No. 79 toward discovering whether rules can be formulated in accordance with that standard. In this subpoena proceeding the appellant cannot ask the court to prejudge the results of the Commission's hearing and determine in advance the very question into which the Commission is inquiring. *Black River Valley Broadcasts, Inc., v. McNinch et al.*, 69 App. D. C. 311, 101 F. (2d) 235, cert. denied, 307 U. S. 623; *Southland Industries, Inc., v. Federal Communications Commission*, 69 App. D. C. 82, 99 F. (2d) 117; *Fleming v. Montgomery Ward and Company*, 114 F. (2d) 384 (C. C. A. 7) cert. denied, 311 U. S. 690; *Cudahy Packing Company of Louisiana v. Fleming*, 119 F. (2d) 209 (C. C. A. 5); *Interstate Commerce Commission v. Baird*, 194 U. S. 25.

There is thus no question properly before this court at the present time as to the rules which may result from the hearing. No policy or rules have been adopted, and it is not possible to determine whether any will be adopted. In any event, the Communications Act authorizes the Commission to make rules and regulations [Sections 4 (i) and 303 (f)] and it is thus empowered to promulgate for the guidance of applicants standards which the Commission will follow in passing upon the "public interest, convenience, or necessity."

Appellant misconstrues the decisions in *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U. S. 470; *Yankee Network v. Federal Communications Commission*, 71 App. D. C. 11, 107 F. (2d) 212; and *Tri-State Broadcasting Company v. Federal Communications Commission*, 71 App. D. C. 157, 107 F. (2d) 956. These cases hold merely that no individual fact is finally binding on the Commission in the grant or denial of radio licenses, but they do not limit the Commission in its power to consider all relevant factors in evaluating the "public interest, convenience, or necessity."

II

The inquiry is also authorized under Section 403 as an investigation in connection with the Commission's power under Section 4 (k) to recommend to Congress concerning additional legislation. The problem of newspaper-radio relationship has been raised many times in Congress. Since Section 4 (k) requires the Commission to advise Congress as to whether additional legislation is necessary, it is within the Commission's power to seek to inform itself fully on the problem before taking any action. The fact that Order No. 79 does not state that the purpose of the inquiry is the recommendation of legislation to Congress is immaterial since the court will look to the substance rather than the form in considering the validity of any action. *United States v. Skinner*, 218 Fed. 870, 873 (S. D. N. Y.). Cf. *Smith v. Interstate Commerce Commission*, 245 U. S. 33, 45, 46.

The case of *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, does not support the contention that the Commission is limited to inquiries into matters already subject to its regulation. That case turned on Section 13 of the Interstate Commerce Act which then limited the Interstate Commerce Commission to inquiry into "matters which might have been the object of a complaint." When Section 13 was thereafter amended to a form identical with Section 403 of the Communications Act, the Supreme Court determined that the Commission's power of inquiry embraced investigation for the purpose of recommending to Congress additional legislation. *Smith v. Interstate Commerce Commission*, 245 U. S. 33.

Federal Trade Commission v. American Tobacco Company, 264 U. S. 298, is not in point since it determined only that an agency engaged in an inquiry may call only for such documents as are relevant to the inquiry. It involved no question as to the validity of the inquiry itself.

III

Appellant's argument that the subpoena deprives him of his rights under the Fifth Amendment is based on his contention that the Commission lacks the power to hold its inquiry, and falls with that contention.

ARGUMENT

Section 409 (a) of the Communications Act provides, in part, as follows:

Any member or examiner of the Commission, or the director of any division, when duly designated by the Commission for such purpose, may hold hearings, sign and issue subpoenas, administer oaths, examine witnesses, and receive evidence at any place in the United States designated by the Commission * * *.

Appellant has at no time questioned the validity of the issuance, signature, substance, or service of the subpoena. The sole objection which appellant appears to make to compliance with the Commission's subpoena is that the Commission is without power to conduct the hearing directed by Orders Nos. 79 and 79-A. This brief will, therefore, deal solely with the question of the Commission's jurisdiction to conduct the hearing provided for by Orders Nos. 79 and 79-A.

Section 403 of the Communications Act provides in part as follows:

The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. [Italics supplied.]

The Commission contends, first, that its inquiry under Order No. 79 is proper in connection with the Commission's licensing functions under Section 309 (a) of the Act; and secondly, in connection with Section 4 (k) which directs the Commission to make annual reports to Congress containing such recommendations as to additional legislation as the Commission may deem necessary.

I. The inquiry is authorized as an investigation into questions which may arise under Section 309 (a)

For the purposes of this case the significant words in Section 403 are those giving to the Commission authority to conduct an investigation into "any matter or thing * * * concerning which any question may arise under any of the provisions" of the Act.

Section 309 (a) provides:

If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding * * *.

The significance of newspaper ownership in a consideration of the extent to which "public interest, convenience, or necessity" would be served by the granting of applications for station licenses is not merely a matter "concerning which any question *may* arise under any of the provisions" of the Act, within the meaning of Section 403. It is a question which *has* been presented to the Commission under Section 309 from time to time almost since its formation. E. g., *Port Huron Broadcasting Company*, 5 F. C. C. 177; *Dorrance D. Roderick*, 3 F. C. C. 616, 5 F. C. C. 563; *The South Bend Tribune*, 6 F. C. C. 783; *Barnes and Weiland et al* and *Patrick Henry Broadcasting Co.*, Dockets Nos. 5425, 5497, decided April 15, 1940; *Stephenson, Edge et al*, and *Walton & Bellatti*, Dockets Nos. 5779, 5870, Proposed Findings of Fact issued March 31, 1941.

Nor is the extent to which this question has been presented to the Commission indicated only by the Commission's decided cases. In recent months the same problem has been presented very frequently in connection with the influx of applications for licenses to engage in frequency modulation (FM) broadcasting. As of the date when hearings began on Order No. 79, forty-five applications out of a total of 116 applications for FM licenses were presented by newspaper interests.

So clear is it that the subject matter of the Commission's inquiry under Order No. 79 constitutes an inquiry into matters both "concerning which any question may arise under the provisions" of the Act and "relating to the enforcement of any of the provisions" of the Communications Act within the meaning of Section 403, that appellant does not seem to dispute the proposition at all. Appellant cites and emphasizes (Br. p. 14) the judicial determinations to the effect that:

The Commission's responsibility at all times is to measure applications by the standard of "public convenience, interest, or necessity." *Federal Communications Commission v. Pottsville Broadcasting Company*, 309 U. S. 134, 145.

Again (Br. 16):

An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U. S. 470, 475.

Finally, appellant does not deny that the problem of joint control of a newspaper and radio station is a factor which the Commission may take into consideration in its determination with respect to the public interest, convenience, or necessity in the granting or denial of applications for licenses. Appellant expressly removes from the case any difference of opinion on this subject, stating in his brief (p. 17):

No question is here presented as to the authority of the Commission to weigh particular applications for

joint control of a newspaper and radio station *as merely one circumstance* in its bearing upon the considerations enumerated in the *Sanders* decision.

In the present inquiry the Commission has undertaken precisely the task which appellant concedes to be within its authority—except that instead of engaging in the time consuming procedure of examining the problem of newspaper ownership piecemeal and repetitiously in connection with individual applications it has undertaken once and for all to secure all of the facts with respect to that issue so that on individual applications an intelligent and expeditious determination may be made as to the “public interest, convenience, or necessity.”

The Commission’s power thus to proceed by general investigation is clear. Section 4 (j) of the Communications Act declares:

The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.

Section 309 which governs the grant or denial of individual applications for licenses contains its own full provisions for the holding of hearings on such applications. The broad powers of inquiry conferred upon the Commission in Section 403 obviously relate, therefore, not to individual inquiries but to the conduct of hearings of precisely the type involved in the present proceeding.

The Act entrusts to the Commission very broad and serious responsibilities with respect to the radio industry of this country.¹ These responsibilities go far beyond the exercise of spot

¹ The scope of these responsibilities is exemplified by a few excerpts from one section of the Act.

“SECTION 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

“(a) Classify radio stations;

“(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

“(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;”

judgments on individual applications. As an expert agency entrusted with the regulation of a complex and constantly developing field of activity the Commission would be departing from the standards of good administrative practice if it failed to conduct a comprehensive inquiry before passing judgment upon so important an issue as that involved in the present investigation.

Far from being adversely affected, appellant has been the beneficiary of the Commission's decision to consider the problem in a single inquiry. The alternative would be to subpoena the appellant in each of 45 hearings with respect to the pending applications which present the problem of newspaper ownership, as well as in all future hearings which involve the same issue.

There is some suggestion in appellant's brief that the Commission is conducting its inquiry for the purpose of arriving at a policy or rule affecting newspaper ownership of radio stations without regard to the statutory standard of "public interest, convenience, or necessity." Large portions of appellant's brief seem to be devoted to the destruction of this "straw man" proposition—a proposition which has no support in the record before this court. The simple fact is that the inquiry grew out of the recurrence of the newspaper issue in connection with the determination of "public interest, convenience, or necessity" and is expressly directed toward securing the information necessary for a determination of that problem. Order No. 79 specifically recites the past recurrence of the problem and its present pendency before the Commission.²

"(d) Determine the location of classes of stations or individual stations ;

* * * * *

"(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act * * *

"(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest ;"

* * * * *

² It is thus meaningless to assert, as does appellant, that the Commission is seeking to "increase the limitations of Sections 310 and 311 of the Act" by declaring or applying a "public policy not in conformity with the sole

Appellant apparently intends to deny that the Commission can find any relationship between newspaper ownership and the "public interest, convenience, or necessity."³ If so, the obvious answer is that appellant cannot in this subpoena proceeding seek to have the courts prejudge the result of the hearing before the Commission and review a hypothetical Commission determination as to the existence or extent of the effects of newspaper ownership of radio stations upon the "public interest, convenience, or necessity." This Court, in conformity with the well-settled law on the subject, has repeatedly rejected any attempts to secure judicial predetermination of issues properly before the Commission and not yet determined by the Commission. In *Black River Valley Broadcasts, Inc., v. McNinch et al.*, 69 App. D. C. 311, 101 F. (2d) 235, cert. den. 307 U. S. 623, this Court said:

The Commission is an administrative agency set up by Congress to determine under statutory direction the rights of the people of the United States to have the best possible radio service. The interest, convenience, and necessity of the public is an essential test for the privilege of operating a radio station. This determination is, by the Act of 1934, lodged in the Commission. It is the only proper agency to decide these public questions, and its findings, under the law, must be maintained if they are not arbitrary or capricious, or erroneous in law, and are based upon substantial evidence. *Federal Radio Commission v. Nelson Bros. Bond and Mortgage Company*, 289 U. S. 266.

Again, in *Southland Industries, Inc. v. Federal Communications Commission*, 69 App. D. C. 82, 99 F. (2d) 117, this court said:

standard of public interest, convenience, or necessity" (App. Brief, p. 15). The Commission has as yet neither declared nor applied any policy at all. It is holding the inquiry expressly for the purpose of ascertaining what policy, if any, can be declared "in conformity with the sole standard of public interest, convenience, or necessity."

³ Such a position is inconsistent with appellant's admission (App. brief, p. 17, quoted supra, pp. 6, 7) that newspaper radio relationship may be considered by the Commission in evaluating the "public interest, convenience, or necessity." Since the contention is, however, implicit in many portions of appellant's argument, we are forced to deal with it briefly here.

It is equally well settled that the courts cannot be resorted to for the adjudication of an administrative question, the determination of which has not been completed by a commission having jurisdiction of it for that purpose. *Northern Pacific Ry. v. Solum*, 247 U. S. 477.

See also, *Monocacy Broadcasting Company v. Prall*, 67 App. D. C. 176, 90 F. (2d) 421; *Woodmen of the World Life Insurance Association v. Federal Communications Commission*, 69 App. D. C. 87, 99 F. (2d) 122, cert. den. 308 U. S. 588; *Saginaw Broadcasting Company v. Federal Communications Commission*, 68 App. D. C. 282, 96 F. (2d) 554, cert. den. 305 U. S. 613; *Times Dispatch Radio Corp. v. Federal Communications Commission*, App. D. C. Nov. 30, 1938; *Tri-State Broadcasting System, Inc. v. Federal Communications Commission*, 71 App. D. C. 157, 107 F. (2d) 956; *American Bond and Mortgage Company v. United States*, 52 F. (2d) 318, 320 (C. C. A. 7); *Sykes v. Jenny Wren Company*, 64 App. D. C. 379, 78 F. (2d) 727, cert. den. 296 U. S. 624.

This principle is equally applicable to an attempt to use a subpoena proceeding for the purpose of securing a premature judicial review. Even where the person resisting the subpoena has challenged the agency's jurisdiction over his business, the courts have pointed out that the subpoena must be enforced for the purpose of enabling the agency to determine whether it has jurisdiction. *Fleming v. Montgomery Ward & Co.*, 114 F. (2d) 384 (C. C. A. 7) cert. den. 311 U. S. 690; *Cudahy Packing Company of Louisiana v. Fleming*, 119 F. (2d) 209 (C. C. A. 5); *President of the United States v. Skeen*, 118 F. (2d) 58 (C. C. A. 5); *National Labor Relations Board v. Barrett Company*, 120 Fed. (2d) 583 (C. C. A. 7); *Interstate Commerce Commission v. Goodrich Transit Company*, 224 U. S. 194; *United States v. Clyde S. S. Company*, 36 F. (2d) 691 (C. C. A. 2) cert. den. 281 U. S. 744. *A fortiori*, the same is true where the court is asked on a subpoena application to undertake to determine which way the ultimate decision will be made or should be made or whether the material

subpoenaed would establish the matter in issue to be true or false. As the Supreme Court said in *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 43:

It is to be remembered in this connection that we are not dealing with the ultimate fact of controversy or deciding which of the contending claims will be finally established. * * *

See also: *Fleming v. Montgomery Ward & Company, supra*; *Consolidated Mines of California v. Securities & Exchange Commission*, 97 F. (2d) 704 (C. C. A. 9).

It is thus clear that the Commission is examining into an issue which is within its jurisdiction and directly related to the enforcement of the provisions of the Act. The Commission itself has made no determination as to that issue, nor indeed has it decided whether any rules will result from its hearing. This collateral proceeding cannot be made the vehicle for a premature determination by the District Court, in derogation of the statutory authority of the Commission to decide in the first instance, and of this Court to review on appeal, issues with respect to the "public interest, convenience, or necessity."

Even the most casual consideration of the foregoing factors will thus make clear that what appellant describes as "the sole question in this appeal" (appellant's brief, page 10) is not even properly an issue at all in the present proceeding. The "sole question" seen by the appellant is the power of the Commission to

adopt and apply a general policy or rules by which persons engaged in the newspaper-publishing business or associated therewith may *by reason of that fact alone* be differentiated as a class apart from all other persons for the purpose either of preference in the assignment of radio facilities or of disqualification from engaging in the radio broadcasting business.

By the very nature of the proceeding, no such issue can be before this Court at the present time. No policy or rules have been adopted by the Commission and indeed it is not possible to determine at this time whether any policy or rules will be

adopted. The inquiry, as stated in Order No. 79, has been undertaken to enable the Commission to consider what rules, "if any," should be promulgated. The Commission's power to conduct the inquiry for its information and guidance in passing on the "public interest, convenience, and necessity" is clear; appellant's objections to any rules or regulations which may result would have to await for promulgation of any such rules.

It may be noted in passing, however, that absolutely no foundation appears for appellant's objections on this score. The Communications Act is very express in its authorization to the Commission to formulate rules and regulations. Sections 4 (i) and 303 (f). There is no foundation, as has been indicated earlier in this brief, for any suggestion that the Commission is contemplating action with relation to newspaper ownership of radio except insofar as the facts reveal a relationship to the "public interest, convenience, or necessity" under the statutory standard. There is no limitation on the Commission's power to promulgate, for the guidance of applicants, standards which the Commission will follow with respect to various factors entering into the Commission's examination of "public interest, convenience, or necessity." *

Appellant has apparently been led into error by a misconception of the decisions in *Federal Communications Commis-*

* Appellant apparently draws a distinction between considering newspaper ownership as "merely one circumstance" and considering it as "in and of itself a factor by which a preference may be granted" (App. brief, p. 17). It may be conceded that the Commission's consideration cannot be finally determined by any one factor but must always proceed in the light of all the factors entering into the "public interest, convenience, or necessity." But certainly it is proper for the Commission to state in its Rules and Regulations the standards to which it will conform in its evaluation of each of the various elements entering into the "public interest, convenience, or necessity." Compare Final Report of the Attorney General's Committee (77th Cong., 1st Sess.), p. 27. Obviously, rules can address themselves to only "one circumstance" at a time. Thus the engineering standards set forth in the Commission's Rules and Regulations, including, for example, such factors in the equipment of a radio station as the manner of wiring and shielding the transmitter (Rules and Regs., Sec. 3.46) and such factors in its operation as the modulation (Sec. 3.55), operating power (Sec. 3.54) and frequency tolerances (Sec. 3.59), each relate to "merely one circumstance * * * bearing upon the considerations enumerated in the *Sanders* decision." We assume that appellant does not challenge the Commission's power to promulgate these engineering standards for the guidance of applicants and licensees.

sion v. *Sanders Brothers Radio Station*, 309 U. S. 470; *Yankee Network v. Federal Communications Commission*, 71 App. D. C. 11, 107 F. (2d) 212; and *Tri-State Broadcasting Company v. Federal Communications Commission*, 71 App. D. C. 157, 107 F. (2d) 956. All three cases, as well as many others which appellant might have cited, emphasize the undisputed proposition that the Commission's standard in the grant or denial of radio licenses is the "public interest, convenience, or necessity." In the *Sanders* case, a rival station, objecting to the Commission's grant of a license, protested that the Commission failed to make a specific finding on the subject of economic injury to the existing station. The court in that case agreed with the Commission that such a finding was not required since the ultimate consideration of the Commission must relate to the "public interest, convenience, or necessity." The Supreme Court was very careful to point out, however, that it was not in any way limiting the power of the Commission to consider various factors in their bearing on the "public interest, convenience, or necessity." It said (309 U. S. at 475, 476):

This is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission, and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both stations—the existing and the proposed—will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that, by a division of the field, both stations will be compelled to render inadequate service.

The same doctrine—that no individual factor is finally determinative, but that the Commission may consider them all in making the ultimate determination—constitutes the extent of the decisions in *Tri-State Broadcasting Company v. Federal Communications Commission*, and *Yankee Network v. Federal Communications Commission*, both *supra*. These decisions all made clear that it is the ultimate function of the Commission to consider all relevant factors in evaluating "public

interest, convenience, or necessity." These decisions, far from negating the power of the Commission to engage in the present inquiry, make it the duty of the Commission to embark on that inquiry in order to be able to make an informed judgment on an issue which has been so frequently presented to it.

The Supreme Court has recognized the vital public policy requiring that governmental agencies acting in the public interest be free of unreasonable strictures in the performance of their fact-finding functions:

To unreasonably hamper the Commission by narrowing its field of inquiry beyond the requirements of the due protection of rights of citizens will be to seriously impair its usefulness and prevent a realization of the salutary purposes for which it was established by Congress. *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 47.

The Commission respectfully submits that appellant's refusal to comply with the subpoena is so lacking in any arguable support in law that the issue before this Court is not whether appellant should be required to appear and testify but how long appellant is to be permitted to delay the Commission in the performance of its lawful functions.

II. The inquiry is authorized in connection with the Commission's power under Section 4 (k) to make recommendations to Congress concerning additional legislation

An additional justification for the Commission's inquiry can be found in Section 4 (k) of the Act. It provides:

The Commission shall make an annual report to Congress, copies of which shall be distributed as are other reports transmitted to Congress. Such report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of interstate and foreign wire and radio communication and radio transmission of energy, together with

such recommendations as to additional legislation relating thereto as the Commission may deem necessary * * *.

The issue as to whether newspaper ownership of radio stations presents any problems which require additional legislation in the interests of public welfare and effective radio operation is one which has been raised with great frequency in Congress.⁵ Since the issue has also been presented to the Commission in connection with individual applications for licenses and in the performance of the Commission's obligation to evaluate the "public interest, convenience, or necessity" in connection with these applications, it is clearly within the Commission's competence and, indeed, an obligation of the Commission under Section 4 (k) to advise Congress as to whether any additional legislation is necessary. For the purpose of rendering such advice on the basis of a well-rounded picture

⁵The following are citations to the Congressional Record and hearings before Congressional Committees in which the question of newspaper ownership of radio stations has been discussed by members of Congress and others.

Senator Dill, June 30, 1926, 67 Cong. Rec. 12353; Representative Willford, June 9, 1934, 78 Cong. Rec. 10992; Representative Monaghan, Aug. 23, 1935, 79 Cong. Rec. 14310-14316; Senator White, March 17, 1937, 81 Cong. Rec. 2334, 2335; Representative McFarlane, July 19, 1937, 81 Cong. Rec. 7280, 7281, 7283; Representatives McFarlane, Leavy, Wearin, and Martin, Aug. 10, 1937, 81 Cong. Rec. 8655, 8656; Senator Clark, Aug. 21, 1937, 81 Cong. Rec. 9604; Representatives Sirovich, Wigglesworth, Jan. 6, 1938, 83 Cong. Rec. 111; Representative McFarlane, Jan. 7, 1938, 83 Cong. Rec. 206, 209, 210; Representative McFarlane, Jan. 14, 1938, 83 Cong. Rec. 561; Senator White, May 27, 1938, 83 Cong. Rec. 7631.

Senators Wheeler and Dill and Com'r. Lafount, Jan. 11, 1930, Hearings before Senate Committee on Interstate Commerce on S. 6, (71st Cong.) Part 12, page 1643; Senator Wheeler and Mr. Aylesworth, N. B. C. president, Jan. 15, 1930, Hearings before Senate Committee on Interstate Commerce on S. 6 (71st Cong.) Part 12, p. 1718; Senators Brookhart and Wheeler and Mr. Hedges, NAB president, Jan. 16, 1930, Hearings before Senate Committee on Interstate Commerce on S. 6, Part 12 (71st Cong.), pp. 1744, 1745; Mr. Nockels, Secy. of Chicago Federation of Labor and manager of WCFL, Jan. 31, 1930, Hearings before Senate Committee on Interstate Commerce on S. 6 (71st Cong.), Part 12, pp. 2077, 2078; S. Howard Evans of Ventura Free Press, Jan. 16, 1933, Hearings before Subcommittee of *Senate Interstate Committee* on S. 5201 (72nd Cong.), pp. 24, 25, 26; Senator Neely, Jan. 29, 1935, Hearings before Senate Committee on Interstate Commerce on Confirmation of Members of F. C. C. (74th Cong.), pp. 195, 196.

of the facts pertaining to the issue, it is clearly within the Commission's power under Section 403 to conduct an inquiry into this question which has arisen under the Act.

Consideration of the basic theory underlying the creation of administrative agencies reinforces the conclusion reached from the clear wording of the statute. One of the principal reasons for the establishment of administrative agencies is the expectation that such agencies will develop expertness in the administration of difficult specialized matters. If the problems in the regulation of an industry are complex enough to warrant the establishment of an administrative agency to deal with them, it seems unlikely that Congress would ask such an agency for recommendations for legislation, grant it broad powers of investigation into any matter arising under the Act, and yet at the same time withhold from it the power to make investigations in connection with possible recommendations for legislation. Such a limitation is not to be read into the Act unless explicitly stated therein. No color of such provision is to be found in the Communications Act.

Appellant takes the position that since Order No. 79 does not state that the investigation was undertaken for the purpose of making recommendations to Congress, the validity of the investigation cannot be sustained on this ground. Appellant, however, makes no attempt to give any authority for this contention. Nor does such authority exist. As a matter of fact, it is a well-established rule of our jurisprudence that a court when called upon to determine the validity of any action will always look to its substance and not to its form merely or to the names by which it has been designated. Thus, in *United States v. Skinner*, 218 Fed. 870, 873 (S. D. N. Y.), the court when called upon to determine the validity of an investigation conducted by the Interstate Commerce Commission said:

The character of the investigation is rather to be determined by its subject-matter, its scope, and the resulting order of the Commission awarding the relief, than by the title of the cause, on the one hand, or by the recitals of the Senate Resolution requesting it, on the other. Cf. *Smith v. Interstate Commerce Commission*, 245 U. S. 33, 45, 46.

Appellant further seems to contend that an inquiry for the purpose of making recommendations to Congress pursuant to Section 4 (k) must fall within the boundaries of the powers conferred upon the Agency by Congress, i. e., must fall within the regulatory powers conferred by the Act itself.

If the data which the Commission is permitted to secure for the purpose of recommending legislation to Congress is limited to information acquired in the course of inquiry into matters over which the Commission already has administrative power, the provision for the recommendation of legislation is rendered ineffective. There can be little need for additional legislation in a field in which the Commission already possesses control through its powers of regulation.

Appellant tries to evade the absurdity of this argument by stating that the Commission may gather data in the course of its regulatory activities which may suggest the need for amendments. This, however, would mean that the Commission in making recommendations to Congress pursuant to Section 4 (k) of the Act may use as the basis for its recommendations only such material as it has been able to gather in a haphazard and disorganized fashion pursuant to its regular routine business of hearing individual applications. Appellant would apparently preclude any intelligent and informed general approach by the Commission to the problems of radio communication.

The simple fact is that appellant's views find no support in the Act itself. There are no words of limitation upon the plain language of Sections 403 and 4 (k). The Commission is a body of men expert in the field of radio communication, and as such is properly given the power of investigation as a preliminary to the recommendation of legislation to Congress.

To sustain his contention that an investigation by the Commission to aid it in recommending legislation to Congress must be limited to matters already within the strictly administrative powers of the Commission, appellant cites the cases of *Harri-man v. Interstate Commerce Commission*, 211 U. S. 407, and *Federal Trade Commission v. American Tobacco Company*, 264 U. S. 298. It is submitted that neither of these cases aid appellant's contention.

Appellant cites the *Harriman* case for the proposition that an investigation must be limited to what might be the subject of a complaint under the Act. That case arose under Section 13 of the Interstate Commerce Act. That section, in the form in which it then stood, provided that the Commission might "institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made." This language had the effect, the court held, of limiting any inquiry by the Commission "to matters which might have been the object of a complaint."

Subsequent to the *Harriman* case, Section 13 was amended to add provisions, identical with those found in Section 403 of the Communications Act, authorizing the Commission to institute inquiries "as to any matter * * * concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act." ⁶ Thereafter, Section 13, as amended, came before the

⁶ Section 13 at the time of the *Harriman* decision read as follows:

"Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

"No complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

As amended by the Mann-Elkins Act, 36 Stat. 551, to the form in which it was before the Court in the *Smith* case, the section read as follows:

"Sec. 13. Said Commission shall, in like manner and with the same authority and powers, investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and the Interstate Commerce Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made, to or before said Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. And the said Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had excepting orders for the payment of money. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

The amended section contains language identical with that of Section 403 of the Communications Act, *supra*, pp. 4, 5.

Supreme Court in *Smith v. Interstate Commerce Commission*, 245 U. S. 33. There the Court held that under the statute as amended the Commission's power of inquiry was not limited to matters which might have been the object of complaint before it but embraced investigation for the purpose of making recommendations to Congress for additional legislation.⁷ And the Court pointed out that "Section 13 has been amended and broadened since the decision of" the *Harriman* case.

Appellant also relies upon the case of *Federal Trade Commission v. American Tobacco Company*, 264 U. S. 298. That case, however, did not even involve any question as to the right of the Federal Trade Commission to engage in an inquiry. The sole issue was the scope of the Commission's demand upon the Company for the production of records. Mr. Justice Holmes characterized the Commission's demand for the papers as "a search through all the respondent's records, relevant or irrelevant, in the hope that something will turn up." He declared that to construe the statutory provisions involved as permitting such action would raise serious doubts as to its validity under the Fourth Amendment with reference to unreasonable searches and seizures. Accordingly he concluded that:

The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence.

Any doubt that the issue in the case turns solely on the relevancy of the documents and the scope of the demand is dispelled by the specific reference to the fact that:

For all that appears the corporations would have been willing to produce such papers as they conceived to be relevant to the matter in hand.

The limits of the *American Tobacco* decision have been made very clear by subsequent judicial construction. In *Federal*

⁷ The report pointed out (245 U. S. 43, 44) that the questions asked of the recalcitrant witnesses were—

"incidental to an investigation as to the 'manner and method' (Section 12) in which the business of the carriers is conducted; they are in requisition of a detailed account of their expenditures and revenues and an exhibit of their financial operations (Section 20) and the answers to them may be valuable as information to Congress (Section 21)." [Italics supplied.]

Trade Commission v. National Biscuit Company, 18 F. Supp. 667 (S. D. N. Y.), the doctrine of the *American Tobacco* case was explained as follows (p. 671):

the writs of mandamus seemed to have been denied on the ground that the demands were too broad and not only included records and papers that were relevant, but those which clearly were not.

In *Fleming v. Montgomery Ward and Company*, 114 F. (2d) 384, 391 (C. C. A. 7), cert. den. 311 U. S. 690, the court stated the doctrine of the *American Tobacco* case as the proposition that "the government may not demand unlimited access to all the corporation records, whether relevant or irrelevant to the subject of inquiry or investigation." To the same effect, see *McMann v. Securities and Exchange Commission*, 87 F. (2d) 377, 379, cert. den. 301 U. S. 684; *Consolidated Mines of California v. Securities and Exchange Commission*, 97 F. (2d) 704, 708 (C. C. A. 9).

The *American Tobacco* case thus can have no relevance to the issue in the present proceeding. It in no way casts any doubt on the power of the Commission to conduct an inquiry into the very specific subject matter described in Orders Nos. 79 and 79-A. There is no issue as to any "search through all the respondent's records, relevant or irrelevant." There is not even any issue as to relevance at all. The subpoena directs merely the appearance of the appellant to give testimony on a very specific subject matter clearly related to the questions under inquiry before the Commission.⁸

In short, the appellant is in error when he asserts that there is any judicial support for the view that despite the express language of the Communications Act the Commission lacks power to conduct an investigation to aid it in recommending legislation. As a matter of fact, investigations by administrative agencies in aid of Congressional legislation and pursuant

⁸ The distinction between a subpoena for the purpose of obtaining testimony and a subpoena or mandamus for the purpose of obtaining documentary evidence is clearly recognized in the cases. *Federal Trade Commission v. Smith*, 34 F. (2d) 323 (S. D. N. Y.); see *McGrain v. Dougherty*, 273 U. S. 135, 153.

to Congressional authorization have been uniformly sustained by the courts. *Federal Trade Commission v. National Biscuit Company*, 18 Fed. Supp. 667 (S. D. N. Y.); *Fleming v. Montgomery Ward & Co.*, 114 F. (2d) 384 (C. C. A. 7), *cert. den.* 311 U. S. 690.

III. Order No. 79 and the subpoena issued and served upon appellant pursuant thereto do not violate appellant's rights as guaranteed by the Fifth Amendment of the Constitution of the United States

Appellant's argument that the order and subpoena deprive him of his rights under the Fifth Amendment is based on his contentions that the Commission lacks the power to hold the newspaper-radio investigation, and, consequently, to issue the subpoena. It has been demonstrated in points I and II of this brief that appellant's contentions in these regards are erroneous and unfounded. It, therefore, follows that appellant's claim that his constitutional rights have been infringed must fail along with the arguments on which he bases it.

CONCLUSION

Because the newspaper-radio investigation is valid and within the jurisdiction of the Communications Commission as an inquiry undertaken on its own motion for the purpose of aiding it in the administrative enforcement of the Communications Act, and for the purpose of assisting it in making recommendations to Congress for additional legislation in the radio field, the subpoena served on appellant should be enforced and the judgment of the District Court affirmed.

Respectfully submitted.

FEDERAL COMMUNICATIONS COMMISSION,
By TELFORD TAYLOR,
General Counsel.

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Counsel.

REPLY BRIEF FOR APPELLANT.

IN THE
**United States Court of Appeals for the
District of Columbia**

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

No. 8039

NOV 29 1941

Joseph B. Littman

CLERK

JAMES G. STAHLMAN, APPELLANT,

v.

**FEDERAL COMMUNICATIONS COMMISSION,
APPELLEE.**

ELISHA HANSON,
Attorney for Appellant,
James G. Stahlman.

HAROLD L. CROSS, JR.,
LETITIA ARMISTEAD,
Of Counsel.

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JUDGE D. LAWRENCE GRONER
UNITED STATES COURT OF APPEALS
WASHINGTON, D. C.

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REPLY BRIEF FOR APPELLANT.

Introductory Statement.

This reply brief is filed because appellee's brief obscures the issue before this Court. Appellant stands upon his original brief and limits this reply to certain of the misinterpretations in appellee's argument.

There is no dispute concerning the facts in controversy. Appellee concedes the correctness of the Statement of the Case as set forth in appellant's original brief.

ARGUMENT.

1. Appellee's argument that Order No. 79 is authorized by the "public interest, convenience, or necessity" standard of the Act fails to meet the issue that the terms of the said order fall outside the powers of the Commission.

Appellee asserts that the inquiry directed by Order No. 79 is expressly for the purpose of securing information essential to the administration of the statutory standard of "public interest, convenience, or necessity".

The terms of the Order show no such purpose. On the contrary Order No. 79 on its face shows that the Commission is claiming power to consider or to adopt and apply a general policy or rules by which persons engaged in the newspaper publishing business may by reason of that fact alone be placed in a separate category with a view either to preference in the assignment of radio facilities or to disqualification from engaging in radio broadcasting.

The Commission has no such power under the Act. And the precise terms of the Act negative the delegation by Congress of any such power.

A reading of appellee's brief shows that its argument fails to meet the issue thus unequivocally stated by appellant. Its failure to join issue with appellant is revealed by the first part of its argument.

After stating that appellant's sole objection is that the Commission is without power to conduct the inquiry (Brief 1, 4) appellee then asserts that appellant does not dispute the proposition that Order No. 79 is an inquiry into matters within Section 403 of the Act (Brief 6). This statement is based upon the unwarranted conclusion of appellee that appellant does not deny that the subject matter of Order No. 79 falls within the public interest standard of

the Act (Brief 6). Appellee reaches this conclusion simply by ignoring appellant's contentions.

Appellee then shifts to two self-contradictory charges: one, that there is "some suggestion" in appellant's brief that the Commission is conducting its inquiry without regard to the statutory standard of public interest; and the other, that "large portions of appellant's brief seem to be devoted to the destruction of this 'straw man' proposition" (Brief 8).

Appellee then changes its mind about appellant's alleged failure to deny that the inquiry is within the Commission's authority by stating that "appellant apparently intends to deny that the Commission can find any relationship between newspaper ownership and the 'public interest, convenience, or necessity'" (Brief 9). This change of position is said to be "implicit in many portions of appellant's argument (Brief 9, footnote 3).

Had appellee been willing and able to meet the clearly stated contentions of appellant on the issue in this proceeding it would not have indulged in the foregoing circumlocutions.

The question as to whether the Commission has the power to conduct the inquiry directed by Order No. 79 must be settled by the terms of that Order.

Now what is the scope of Order No. 79? Appellant contends that it singles out one class of persons by grouping together their applications merely by reason of the fact that they happen to be associated with newspapers. Appellant further contends that among the various courses of action which the Commission might take pursuant to its Order is the adoption of a policy by which joint ownership of newspapers and radio stations may be deemed so beneficial to the public as to be encouraged or a policy by which such common ownership may be deemed so detrimental to the public as to be discouraged—even prohibited.

The Commission has no power to consider these alternatives. A choice between a policy of encouraging integration of newspapers and radio stations and a policy compelling divorcement of these two enterprises is one that only Congress can make, if it can be made at all.

As to this proposition appellee insists that appellant has misconceived the issue. Appellee argues that this proceeding is premature because the Commission has not yet adopted any policy or rules and indeed may never do so; that until the Commission acts the question is therefore hypothetical (Brief 9-12).

But this argument of appellee is based upon the false premise that Order No. 79 is limited to the securing of information preliminary to a determination of "public interest, convenience, or necessity".

By this method appellee attempts to change the issue in controversy. Only a judicial interpretation of Order No. 79 can determine whether or not its subject matter falls outside the powers conferred upon the Commission by the Act.

Under our traditional Anglo-American jurisprudence this controversy raises a question of law under Section 409 (d) of the Act. The question raised herein is clearly distinguished from the question of exhaustion of administrative remedies prior to resort to the courts. The latter doctrine applies only when a party seeks to prevent *the exercise of power* conferred by the statute upon the administrative agency, whereas here the appellant is testing *the existence of the power itself*. For that reason appellee does not meet the issue when it cites on pages 9 and 10 of its brief cases before this Court involving the appealability of orders under the provisions of Section 402 (b) of the Act. Those were cases in which, as appellee states on page 9 of its brief, an attempt was made "to secure judicial predetermination of issues *properly* before the Commission

and not yet determined by the Commission'' (italics supplied).

The record before this Court includes not only Order No. 79 but also Order No. 79-A and the Commission's questionnaire of June 28, 1941. The latter two elaborate the scope and purpose of Order No. 79 by setting forth the subject matter on which testimony and other evidence is to be taken pursuant to Order No. 79. Therefore, this Court as a matter of law can determine whether the subpoena herein is in aid of a lawful power of the Commission. In this state of the record appellant is entitled to bar a trespass upon his rights, since he claims that there is no power to act at all.

On the basis of this approach appellant, contrary to what is stated in appellee's brief (Brief 6-7), vigorously contended that Order No. 79 exceeds the power conferred upon the Commission under the public interest standard of the Act. The Commission's claim that the Order falls within its authority under that standard reverts to a view, long since repudiated by the Supreme Court, that its discretion under that clause is unlimited. On the contrary, appellant took great pains to point out that the *Sanders* case (309 U. S. 470 (1940)) and certain decisions of this Court require the Commission to apply the statutory standard of public interest as delimited by the considerations mentioned in the *Sanders* case.

The field of radio broadcasting is open on equal terms to all persons except those specifically disqualified by the Act. If an applicant qualifies in the light of the considerations set forth in the *Sanders* case the Commission is under a mandate to grant his application. If he cannot meet those qualifications the application must be denied.

Newspapers and persons associated with newspapers are not among those disqualified by the Act. As this Court has held, there is no provision in the Act or rule of law

that prohibits broadcasting by the owner of a newspaper. *Tri-State Broadcasting Company v. Federal Communications Commission*, 68 App. D. C. 292, 294, 96 F. (2d) 564, 566 (1938).

Just as the Act does not disqualify newspapers or persons associated with newspapers from holding station licenses, neither does it give them a preferential status in respect of applications.

The Commission protests that it is doing the very thing that the *Sanders* decision permits it to do except that instead of dealing with particular applications one by one, it is seeking to inform itself generally about the effects of common ownership of newspapers and radio stations so as to be in a position to judge the weight of that circumstance in its bearing upon particular applications (Brief 7).

The Commission's case falls because it has no power under the Act to group the applications of persons merely by reason of their association with newspapers for the purpose of arriving at a *general policy* with respect to such applications and the qualifications of the applicants. It therefore has no power to promulgate rules or regulations to effectuate such a policy.

The Commission confuses public interest with public policy. In so doing it seeks to appropriate to itself the policy making powers of Congress. This is beyond its authority under the Act.

Appellee did not dispute appellant's statement that Order No. 79 was not issued as a result of any complaint or pursuant to a specific application or conflicting applications for station licenses.

The *Sanders* case confers upon the Commission authority to apply the circumstance of newspaper ownership in passing upon a particular application or conflicting applications for the same facilities as measured by the statutory standard. But that is not what the Commission is seeking

to do pursuant to Order No. 79. What the Commission is doing here is to make the mere fact of joint control of newspapers and radio stations an independent element upon which it may erect a policy in substitution of the one written by Congress into the Act.

As now written in the Act the public policy is non-discriminatory. In its proceeding instituted by Order No. 79 the Commission asserts the power to change the non-discriminatory policy fixed by Congress to a policy of discrimination. It cannot avoid the issue precipitated by its Order No. 79 either by saying it may never adopt any policy as a result of its inquiry made pursuant to the terms of that Order or by pleading that it may use the inquiry for some purpose not disclosed in the Order.

The phrase "public interest, convenience, or necessity" cannot be used as a lever by which the Commission can legislate on public policy which it mistakenly calls public interest.

The record in this case shows that Commission's Order No. 79 encompasses so many possible matters of a legislative nature that the American Newspaper Publishers Association, which represents more than 80% of the circulation of daily and/or Sunday newspapers in the country, was convinced that the Commission was assuming a role that only Congress can occupy in even considering the adoption of a public policy in respect of joint ownership of newspapers and radio stations. Yet when a motion was made by the aforesaid Association on July 14, 1941, prior to the institution of the hearings herein, to vacate Orders No. 79 and No. 79-A and terminate the investigation on the ground that the Commission lacks statutory authority to engage in such an inquiry, the Commission denied this motion without affording counsel for this Association an opportunity to argue it (Appellant's App. 20, 34-37).

Appellee admits that the question of common ownership of newspapers and radio stations is a disputed question of public policy which has been debated in Congress and elsewhere for many years (Brief 15). If this proves anything, it demonstrates that this Court can take judicial notice of the controversial character of that problem and that after having debated it prior to the passage of the Communications Act of 1934, Congress determined not to vest the Commission with any power to decide whether it should permit such joint ownership or should compel divorcement. In fact Congress wrote limitations to the contrary into Sections 307 (a), (b), (d), 309 (a), 310, 311, 312 (b) and 319 (a). Order No. 79 by its very terms seeks to go beyond these limitations. By so doing it oversteps the boundaries which have been established by the Supreme Court in its interpretation of the public interest standard.

It may well be asked how an order which calls for consideration or adoption of a general policy or rules affecting applicants who are placed in a separate category can result in anything but a declaration of public policy rather than an application of public interest as defined in the standard of the Act. Public interest must always be determined with reference to the specific factual situation in connection with a particular application or conflicting applications. The determination of the qualifications of a particular applicant as they bear upon the elements of public interest announced in the *Sanders* case cannot stamp newspaper ownership or association in and of itself as a disqualifying factor or as a factor of preference. Therefore, it is plain that the Commission is not investigating to provide a basis for passing upon a particular application or a comparative appraisal of conflicting applications but is going beyond the sphere of its powers to arrive at a public policy upon which Congress has not yet spoken. The sweep of Order No. 79, as further disclosed by supple-

mentary Order No. 79-A and the comprehensive questionnaire of June 28, 1941, belies appellee's insistence that it is simply attempting to make an informed judgment in evaluating the elements under the public interest standard.

2. Appellee's argument that Order No. 79 is within the authority of either Section 4 (k) or Section 403 of the Act also fails to meet the issue that the Order is beyond the powers of the Commission.

An examination of Order No. 79 will show that its only avowed purpose is an investigation as a basis for the adoption of a general policy or rules to be issued and applied by the Commission and for its own guidance.

The Court will search in vain for any statement in Order No. 79 that the investigation is for the purpose of making recommendations to Congress.

Likewise the Court will search in vain for any statement in Order No. 79 that relates to any matter or thing concerning which the Act authorizes complaint to be made, or concerning which any question may arise under any of the provisions of the Act, or relating to the enforcement of any of the provisions of the Act.

The argument of appellee that one of the purposes of Order No. 79 is to secure data for the purpose of recommending legislation to Congress is pure subterfuge. It was not until July 1, 1941, or nearly three and one-half months after Order No. 79 was promulgated, that this idea occurred to the Commission, and then appellee expressed it only in a press release (Mimeograph No. 51684).

If the Commission has the power to issue statements of policy or rules concerning applications for high frequency broadcast stations or future acquisition of standard broadcast stations by persons associated with newspapers or newspapers themselves, then there is no occasion for it

to make any inquiry for the purpose of recommending legislation to Congress on this subject.

If it does not have that power then its inquiry under Order No. 79 is an unlawful one and this Court should so hold.

Appellee should not be permitted to straddle the issue or to inject a new issue into the case by claiming for its Order something that the Order itself does not even indicate.

Appellant will not burden the court with a restatement of its argument that Order No. 79 is not within the powers conferred by either Section 4 (k) or Section 403 of the Act. No matter how broad the terms of Section 403 may be, the Commission's inquisitorial powers can be no greater than its powers under the Act. They are not as broad as the regulatory powers which Congress itself may validly exercise in the field of communications.

Conclusion.

For the reasons set forth in appellant's original brief and enlarged upon here, it is submitted that the judgment of the court below should be reversed, that its order should be set aside and that the case should be remanded with directions to dismiss the application of the Commission.

Respectfully submitted,

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